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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND.

PHYLLIS BAXTER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a prior finding that any pattern or practice of employment discrimination was not "pervasive" precludes, as a matter of res judicata, all employees from litigating any individual claims of discrimination?

2. Did the Court of Appeals violate the principles of Pullman-Standard Co. v. Swint, 456 U.S. 273 (1982) when it held that the trial court's finding of intentional discrimination was "a statement of ultimate fact ... not a finding of fact reviewable under the 'clearly erroneous' rule"?

3. Does Rule 52, F.R.C.P., authorize the appellate courts to reconsider de novo or give little weight to the decision of a district court merely because the lower court based its findings of fact on pro-

posed findings submitted by counsel at the
direction of the court?

PARTIES

The parties to this proceeding are Sylvia Cooper, Constance Russell, Helen Moore, Elmore Hannah, Jr., Phyllis Baxter, Brenda Gilliam, Glenda Knotts, Alfred Harrison, Sherri McCorkle, the Federal Reserve Bank of Richmond, and a class composed of all black persons who were employed at the Charlotte facilities of the Bank at any time between January 3, 1974, and September 8, 1980, who were subjected to employment discrimination on the basis of race. The Equal Employment Opportunity Commission was a party to the Cooper action in the courts below.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners Sylvia Cooper, et al., and
Phyllis Baxter, et al., respectfully pray
that a Writ of Certiorari issue to review
the judgment and opinion of the United
States Court of Appeals for the Fourth

Circuit entered in this proceeding on January 11, 1983. Civil actions commenced separately by petitioners Cooper and Baxter were consolidated in the court of appeals; a joint petition is being filed pursuant to Rule 19.4 of this Court.

OPINIONS BELOW

The decision of the court of appeals is reported at 698 F.2d 633, and is set out at pp. 2a- 185a of the Appendix. The order denying rehearing, which is not yet reported, is set out at p. 186a. The district court's Memorandum Decision of October 30, 1980, is not reported, and is set out at pp. 191a-96a. The district court's Findings of Fact and Conclusions of Law, which is not reported is set out at pp. 197a-285a. The district court orders of May 29, 1981, and February 26, 1982, which are not reported, are set forth at pp. 286a-88a and 290a-97a respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1983. A timely Petition for Rehearing was filed, which was denied on April 6, 1983 by an equally divided court. (App. p. 186a) This Court granted an extension of time in which to file the Petition for Writ of Certiorari until August 4, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 52(a), Federal Rules of Civil Procedure, provides:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court

shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

This petition involves two related proceedings which were consolidated in the court of appeals for argument and decision.

Cooper Plaintiffs: On March 22, 1977 the EEOC brought suit against the Federal Reserve Bank of Richmond alleging that the Bank had discriminated against black employees in making promotions at its Charlotte,

North Carolina facilities, and that it had discriminated in particular against Sylvia Cooper because of her race, first by refusing to promote her to a supervisory position and then by discharging her. Jurisdiction was asserted under 42 U.S.C. 2000e-5. On September 21, 1977, Cooper and three other present or former Bank employees (the "Cooper plaintiffs") were permitted to intervene as plaintiffs. On April 28, 1978, the district court certified a plaintiff class consisting of blacks who had been employed at the Bank's Charlotte branch since January 3, 1974, and had been discriminated against on the basis of race.

The case was tried without a jury in September, 1980. On October 30, 1980, the district court issued a Memorandum of Decision which held that the Bank had discriminated against Cooper and another

intervenor, but concluding that no such discrimination had been shown regarding the other two intervenors. The trial court also concluded that the Bank had engaged in a pattern and practice of discrimination in denying promotions to black employees in pay grades 4 and 5.

The district court directed counsel for the plaintiffs to propose more detailed "findings of fact and conclusions of law consistent with [its] findings." 194a. The plaintiff submitted the requested proposed findings, and the defendant responded with comments and objections of its own. On May 29, 1981, the district court issued proposed findings substantially similar to those urged by plaintiff. 197a-285a.

On appeal the Fourth Circuit held that the finding of discrimination contained in the district court's October 30, 1980 Memorandum was "a statement of ultimate

fact ... not ... reviewable under the 'clearly erroneous' rule." 15a. The court of appeals ruled that the more detailed findings issued by the district court were to be subject to a special "careful scrutiny" (23a) because based on findings proposed by counsel, a practice the appellate court expressly disapproved. 16a. The court of appeals then undertook an exhaustive 25,000 word re-examination of the evidence considered by the trial judge, and reversed each of his findings of discrimination. Petitioners sought rehearing en banc in the Fourth Circuit, urging inter alia that the panel's decision exceeded the bounds of appellate review permitted by Rule 52(a), Federal Rules of Civil Procedure, and by this Court's decision in Pullman-Standard Co. v. Swint, 456 U.S. 273 (1982). Rehearing en banc was denied by an equally divided court, judges Winter,

Phillips, Murnaghan and Sprouse all having voted to reconsider the panel decision.

Baxter Plaintiffs

At the trial of the Cooper class action the plaintiffs presented testimony from a number of class member witnesses, including Phyllis Baxter, Brenda Gilliam, Glenda Knott and Sherri McCorkle (the "Baxter plaintiffs"), all of whom held job grades 6 or above. The Bank successfully argued that the district court should receive the class members' testimony only as it related to the pattern and practice allegation, and that the court should not pass on the merits of these witnesses' individual claims. The trial court ruled that the individual claims of the Baxter plaintiffs would not be heard, and that the Court would not consider their testimony except insofar as it tended to

establish the existence of a class-wide pattern and practice of discrimination.

After trial, the district court issued a Memorandum of Decision in the Cooper litigation holding that the class had demonstrated a discriminatory pattern of promotions out of grades 4 and 5. However, with respect to promotions out of grades 6 and above, the Court held:

There does not appear to be a pattern and practice pervasive enough for the court to order relief. 194a. (emphasis added)

The trial court did not, however, rule that there had been no discrimination in grades 6 and above.

Shortly after receiving the trial court's Memorandum in Cooper, the Baxter plaintiffs sought to intervene in that action. Again, as it had done during trial, defendant's counsel opposed hearing the individual claims of the Baxter plain-

tiffs in the context of the Cooper action. In its memorandum in opposition to the motion to intervene, the defendant assured the district court that denying intervention would not preclude a separate subsequent action by the Baxter plaintiffs:

"There is no way there will be any prejudice to applicants in denying their motion [to intervene], since they can pursue any individual claims they have in separate proceedings." (Defendant's Response to Motion to Intervene, p. 4.)

The district court denied the Baxter plaintiffs' Motion to Intervene in EEOC v. Cooper on the very basis advanced by the defendants, explaining:

I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a \$1981 suit next week, or why they could not file a claim with EEOC next week All motions for leave to intervene are thus denied without prejudice to any underlying rights the intervenors may have. 288a.

The Baxter plaintiffs promptly filed a separate proceeding, styled Baxter, et al. v. Federal Reserve Bank. Their Complaint alleged that each had been discriminated against in certain respects on an individual basis. The Baxter plaintiffs did not claim that the defendant had engaged in a pattern of discrimination against a class of black employees. The defendant moved to dismiss that new action, contending that the Cooper decision barred it as a matter of res judicata. The district court denied the motion to dismiss, but certified the question to the court of appeals (291a), which reversed. 172a-85a. Upon consideration of the Baxter plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc, the Panel's decision was upheld by an equally divided (4-4) Court. 188a.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Resolve A Conflict Among the Courts of Appeals Regarding Whether A Finding of No Pervasive Pattern and Practice of Discrimination Bars All Individual Claims of Discrimination Because of Res Judicata

The Fourth Circuit's decision that the rejection of a class-wide pattern and practice discrimination claim bars all individual discrimination claims is squarely in conflict with what has hitherto been the uniform view of the other courts of appeals which have considered this issue. In Dickerson v. United States Steel, 582 F.2d 827 (3d Cir. 1978), the Third Circuit rejected the identical argument made by the Bank in this case:

The Company contends that, as a threshold matter, the district court's dismissal of a class-wide claim bars individual lawsuits under that claim by class member witnesses The class claims were not examined as a mere aggregation of individual claims, as the Company's argument suggests. Rather, the district court looked to

statistical evidence offered to support the existence of a practice or pattern of discrimination The district court's finding of an absence of class-wide discrimination is not necessarily inconsistent with a claim that discrete, isolated instances of discrimination occurred, for which the statistical evidence of a pattern of discrimination may have been lacking; there may have been sufficient evidence to establish a prima facie case of discrimination directed against specific employees. Therefore, the court's decision as to class-wide claims of discrimination does not, as a matter of res judicata, bar class members from asserting individual claims of personal discrimination.

582 F.2d at 830-31.

In Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978), the Fifth Circuit held that an individual prison inmate who had testified during an earlier class action regarding prison conditions could still litigate the defendant's particular treatment of him, and was not barred by that earlier prison-wide class action. The court of appeals emphasized that the prior litiga-

tion had not specifically adjudicated Bogard's personal claim, and expressed doubts as to whether the district court would have been willing to resolve such individual questions in the context of the class litigation. 586 F.2d at 409. In Marshall v. Kirkland, 602 F.2d 1282 (8th Cir. 1979), the plaintiffs in a class action had sought individual relief for only certain members of the class. The Eighth Circuit held that relief for other individuals could not be obtained on appeal, but stressed

Our determination is "without prejudice" to the right of the other members of this class ... to initiate a new action if they see fit. [C]lass members whose claims were not actually litigated should not be estopped by res judicata.

602 F.2d at 1282.

Recently, the Eleventh Circuit reached a result inherently inconsistent with the Fourth Circuit's holding. In Eastland

v. T.V.A., ____ F.2d ____ (11th Cir. 1983), the court affirmed the district court's determination that there was no class discrimination, but reversed its finding of no discrimination against certain class members. That decision conflicts squarely with the Fourth Circuit's holding that a finding of no class discrimination disposes of all individual claims as well.

The decision of the Fourth Circuit conflicts as well with the decisions of this Court. Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) makes clear that the absence of a general policy of discrimination "cannot immunize an employer for liability for specific acts of discrimination." 438 U.S. at 579. It emphasized that the existence of a racially balanced workforce, while relevant to a claim that a particular employment action was racially motivated, could not "conclu-

sively demonstrate" the absence of such a motive. 438 U.S. at 580 (emphasis added). See also Connecticut v. Teal, ____ U.S. ____, 73 L.Ed. 2d 130, 142 (1982). Conversely, the decisions of this Court in Teamsters v. United States, 431 U.S. 324 (1977), and Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), establish that a finding of class-wide discrimination does not constitute a final adjudication of the claims of individual class members. In such a case, the employer, while bound by the finding of a pattern of discrimination, still is entitled to an opportunity to prove that particular employment decisions were made free of discriminatory intent.

If a finding regarding the existence of a class-wide pattern and practice of discrimination is conclusive of all individual claims of class members, individual class members would have no choice but to

intervene en masse prior to trial in order to protect those individual claims. Were that to occur, Rule 23 class actions would become an irresistible invitation for the joinder of claims which, by definition, are "so numerous that joinder ... is impracticable." Rule 23(a), Federal Rules of Civil Procedure. Such a rule would be equally burdensome on defendants, which would be required in response to proof of a class-wide pattern of discrimination to offer individualized defenses to the potential claims of each and every class member. The district courts would no longer be able to use the bifurcated trial procedure which was expressly sanctioned by Teamsters and Franks and which the lower court have found eminently practical and expeditious; individual and class claims would have to be tried together.

This is not a case in which the individual claims of the Baxter plaintiffs either were or even could have been adjudicated in the class action litigation. The district judge did not find there had never been any discrimination in any promotions above pay grade 6, but only that there was not proof that such discrimination was sufficiently "pervasive" to warrant a class-wide remedy. 194a. No objection is made that the Baxter plaintiffs failed to seek resolution of their claims in the Cooper litigation; on the contrary, they tried to do precisely that. The decision of the Fourth Circuit both required the Baxter plaintiffs to pursue their claims in the class litigation, and upheld a district court order forbidding them from doing so. Administered in this way Rule 23 would serve as a snare for the diligent as well as the unwary.

II. Certiorari Should Be Granted To Resolve A Conflict Among the Courts of Appeals Regarding the Use of Proposed Findings Prepared By Counsel for the Parties

Rule 52(a) requires the United States District Courts, in all cases tried without a jury, to "find the facts specially and state separately their conclusions of law thereon." Since the original promulgation of this Rule, there has been a widespread practice among district judges of asking for and relying on proposed findings of fact and conclusions of law drafted by counsel.^{1/} In some instances trial judges solicit such findings prior to deciding the case; in other instances they are sought only after the judge has indicated how he or she intends to rule on the controversy at issue.

^{1/} See, e.g., Saco-Lowell Shops v. Reynolds, 141 F.2d 587, 589 (4th Cir. 1944).

The appellate courts are increasingly divided over whether the use or adoption of such proposed findings is always or ever permissible, and those circuits which disapprove this practice are in disagreement as to how such findings should be dealt with on appeal. These divisions are especially sharp over the district court practice, followed in this case, of asking the prevailing party to draft proposed findings consistent with the trial judge's announced decision in its favor.

The procedure utilized by the trial judge in this case is expressly sanctioned in the Sixth, Seventh and District of Columbia Circuits. The court of appeals for the District of Columbia most recently rejected an attack on this practice in Halkin v. Helms, 598 F.2d 1, 8 (D.C.Cir.

1978). That circuit court defended the practice at length in Schilling v. Schwitzer-Cummins Co., 142 F.2d 82 (D.C. Cir. 1944):

Whatever may be the most commendable method of preparing findings -- whether by a judge alone, or with the assistance of his ... law clerk ... or from a draft submitted by counsel -- may well depend upon the case, the judge, and facilities available to him. If inadequate findings result from improper reliance upon drafts prepared by counsel -- or from any other case -- it is the result and not the source that is objectionable. 142 F.2d at 83 (footnotes omitted)

In Hill & Range Songs, Inc. v. Fred Rose Music, Inc., 570 F.2d 554 (6th Cir. 1978), the Sixth Circuit noted that it was "not unusual" for a court "to adopt verbatim" proposed findings of fact and conclusions of law, and held that so long as those findings and conclusions are supported by the record "it makes no real difference which counsel submitted them." 580 F.2d at 558. See also O'Leary v. Liggett Drug

Co., 150 F.2d 656, 667 (6th Cir. 1946) ("findings of fact, prepared and submitted by the successful attorneys, [which] have been adopted by the trial court ... are entitled to the same respect as if the judge, himself, had drafted them"). The Seventh Circuit upheld the practice in Schwerman Trucking Co. v. Gartland Steamship Co., 496 F.2d 466, 475 (8th Cir. 1974), explaining:

By having the prevailing party submit proposed findings of fact and conclusions of law, the judge followed a practical and wise custom in which the prevailing party has "an obligation to a busy court to assist it in performance of its duty" under Rule 52(a).

See also Scheller-Globe Corp. v. Milsco Mfg. Co., 636 F.2d 177, 178 (7th Cir. 1980) ("This circuit ... leaves the matter within the trial court's discretion and recognizes that the procedure can be of considerable assistance to a trial court"); Missi-

Mississippi Valley Barge Line Co. v. Cooper Terminal Co., 217 F.2d 321, 323 (7th Cir. 1954) ("It was perfectly proper to ask counsel for the successful party to perform the task of drafting the findings")

But this use of findings prepared by the prevailing party, a procedure described by the Seventh Circuit as of "considerable assistance" to the trial courts, has been specifically disapproved, although in varying degrees, by the Third,^{2/} Fifth,^{3/} Eighth,^{4/} and Tenth^{5/} circuits. On the other

2/ Schlensky v. Dorsey, 574 F.2d 131, 148-49 (3d Cir. 1978); Roberts v. Ross, 344 F.2d 747, 751-53 (3d Cir. 1965).

3/ Amstar Corporation v. Domino's Pizza, Inc., 615 F.2d 552, 258 (5th Cir. 1980).

4/ Askew v. United States, 680 F.2d 1206, 1207-08 (8th Cir. 1982); Bradley v. Maryland Casualty Co., 382 F.2d 415, 422-23 (8th Cir. 1967).

5/ Kelson v. United States, 503 F.2d 1291, 1294 (10th Cir. 1974).

hand, the Third^{6/} and Eighth^{7/} circuits do approve the use of findings drafted by counsel if the trial court solicits and considers such proposed findings from both sides prior to its decision on the merits. In Roberts v. Ross, 344 F.2d 747, 752 (3d Cir. 1965), the Third Circuit noted:

In most cases it will appear that many of the findings proposed by one or the other of the parties are fully supported by the evidence, are directed to material matters and may be adopted verbatim and it may even be that in some cases the findings and conclusions proposed by a party will be so carefully and objectively prepared that they may all properly be adopted by the trial judge without change.

But the verbatim adoption of proposed findings, sanctioned in appropriate cases by these two circuits, is "roundly con-

6/ Schlensky v. Dorsey, 574 F.2d at 148-49; Roberts v. Ross, 344 F.2d at 752-53.

7/ Bradley v. Maryland Casualty Co., 382 F.2d at 423.

demned" by the Second Circuit^{8/} and approved only in "highly technical" cases in the First^{9/} and Ninth^{10/} Circuits. The most recent Tenth Circuit opinion on this subject states both that the verbatim adoption of proposed findings "may be acceptable under some circumstances" and that it "is an abandonment of the duty imposed on trial judges by Rule 52."^{11/}

Consistent with this inter-circuit conflict, the Fourth Circuit's position on

8/ International Controls Corp. v. Vesco, 490 F.2d 1334, 1341 n. 6 (2d Cir. 1974).

9/ In Re Las Colinas, Inc., 426 F.2d 1005, 1009 (1st Cir. 1970) ("[T]he practice of adopting proposed findings verbatim should be limited to extraordinary cases when the subject matter is of a highly technical nature requiring expertise which the court does not possess.")

10/ Continuous Curve Contact Lenses v. Rynco Scientific Corp., 680 F.2d 605, 607 (9th Cir. 1982).

11/ Ramey Construction Co. v. Apache Tribe, 616 F.2d 464, 466 (10th Cir. 1980).

the use of proposed findings has undergone a complete reversal in recent years. Saco-Lowell Shops v. Reynolds, 141 F.2d 587, 589 (4th Cir. 1944), held that findings of fact "are not weakened or discredited because made by the trial judge in the form requested by counsel." In The Severance, 152 F.2d 916 (4th Cir. 1945), the trial judge had requested the prevailing party to draft proposed findings of fact and conclusions of law, and had adopted them "practically in toto"; the court of appeals held that "[t]his practice is not to be condemned." 152 F.2d at 918. Chicopee Manufacturing Corp. v. Kendall Co., 288 F.2d 719, 724-25 (4th Cir. 1961), citing decisions in the Sixth and District of Columbia circuits, noted there was authority for "the adoption of such ... proposed findings and conclusions as the

judge may find to be proper," and condemned only the ex parte drafting of an opinion by counsel for one of the parties. In White v. Carolina Paperboard Corp., 564 F.2d 1073 (4th Cir. 1977), the court of appeals, although criticizing the content of particular findings adopted from the proposals of counsel, expressed no per se disapproval of the use of such findings, and merely concluded that" [o]n remand, we suggest the district court prepare its own opinion." 564 F.2d at 1082-83. (Emphasis added) In July, 1982, the Fourth Circuit "cautioned against" the adoption of findings solicited by the trial judge from the prevailing party. Holsey v. Armour, 683 F.2d 864, 866 (4th Cir. 1982). Not until the decision below did that "caution" evolve into "disapproval." 16a. Two months after the decision in the instant case, the Fourth Circuit announced that it

had "previously condemned" this practice, inexplicably citing The Severance, which, as we noted above, had held precisely the opposite. Cuthbertson v. Biggers Brothers, Inc., (Slip opinion, March 9, 1983, pp. 8-9).

Those courts of appeals which do disapprove the adoption of findings prepared by counsel are themselves in disagreement about how such findings should be treated on appeal. No court regards that practice as reversible error. In at least some circumstances the First^{12/} and Tenth^{13/} circuits will remand a case for additional findings drafted by the trial court itself. The Eighth circuit applies the same "not clearly erroneous" rule

^{12/} In re Las Colinas, Inc., 426 F.2d 1005, 1010 (1st Cir. 1970).

^{13/} Ramey Construction Co. v. Apache Tribe, 616 F.2d 464, 467-69 (10th Cir. 1980).

regardless whether the findings appealed from were drafted by counsel or the trial judge.^{14/} Five circuits apply a special standard of review when considering findings of fact adopted by the trial court from proposals submitted by counsel. The First Circuit conducts a "most searching examination for error" in such cases.^{15/} In the Third Circuit findings drafted by counsel are "looked at ... more narrowly and given less weight on review."^{16/} The Fifth Circuit will "take into account" the origin of such findings,^{17/} while the Ninth Circuit subjects them to "special

^{14/} Askew v. United States, 680 F.2d 1206, 1208 (8th Cir. 1982).

^{15/} In re Las Colinas, Inc., 426 F.2d 1005, 1010 (1st Cir. 1970).

^{16/} Roberts v. Ross, 344 F.2d 747, 752 (3d Cir. 1965).

^{17/} Amstar Corporation v. Domino's Pizza Inc., 615 F.2d 252, 258 (5th Cir. 1980).

scrutiny."^{18/} The Fourth Circuit decision in the instant case refers to several of these apparently divergent standards without indicating which was being adopted. 23a-24a.

The standard of review actually applied by the court of appeals in this case was for all practical purposes a de novo determination of the controversy. The Fourth Circuit's 25,000 word opinion is more than three times as long as the trial judge's 38 page Findings of Fact and Conclusions of Law. Virtually every finding of fact made by the trial court on an issue controverted by the defendants was decided afresh, and in favor of defendants, on appeal. The appellate court's discussion of the minute details of the conflicting

^{18/} Continuous Curve Contact Lenses, Inc. v. Rynco Scientific Corporation, 680 F.2d 605, 607 (9th Cir. 1982).

evidence reflects, not an effort to determine whether the lower court's findings were supported by substantial evidence, but an effort, in the words of the Fourth Circuit, to determine what result would "reflect the truth and the right of the case." 24a.

The Fourth Circuit's treatment of petitioner Cooper's claim of discrimination in promotion is typical of its approach. There was conflicting testimony regarding whether the promotion at issue in her case was to the position of "utility supervisor" or "reader sorter supervisor." The trial court, expressly relying on the demeanor of the witnesses, held that the position was that of a utility supervisor. 220a, 266a-267a. The court of appeals, after reviewing the same evidence, reached the opposite conclusion. 155a-158a. The district court found that Cooper was qualified to supervise operation of the

reader-sorter machine. 266a. The court of appeals found she was not. 161a. The district court concluded that Cooper was more qualified for the promotion than the white employee who received it, 220a; the court of appeals concluded that she was not. 166a. The district court held that the reasons given by defendant for promoting a less experienced white in place of Cooper were "pretextual," noting that the defendant had ignored its own procedures in refusing to even consider Cooper for the promotion, 265a-66a; the court of appeals accepted without question the defendant's account of the "qualifications" for the job at issue. 163a.

The court of appeal's rejection of the claim of class wide discrimination demonstrates the dangers of such de novo appellate review. Where, as here, there is a complex trial involving technical

issues, and thousands of pages of exhibits and documents, an appellate court which attempts to decide afresh all the questions at issue is virtually certain to misunderstand or overlook relevant evidence. The trial court in this case found there was a pattern and practice of discrimination in promoting employees from grades 4 and 5, noting that blacks remained in these low paid entry level positions longer than did whites. Between 1966 and 1977, for example, white employees in grade 4 received promotions after an average of 652 days, while black employees waited an average of 982 days. 241a. The court of appeals reversed on the assumption that these differences were the result of black employees being assigned to service and cafeteria jobs rather than to clerical positions. 105a-106a.

The court of appeals believed "it was reasonable to expect" a substantial portion of black hirees would be assigned to service and cafeteria work. 105a. But the district court found that over a ten year period only 3 blacks expressing no job preference had been assigned to cleaning jobs. 243a. The court of appeals felt it was "to be expected" that there would be few promotion opportunities in service and cafeteria jobs. 106a. But the defendant only claimed that 13 of the 68 blacks in those departments had no promotional opportunities.^{19/} The court of appeals rejected an analysis of promotion rates because it did not include employees who had resigned or been fired after receiving a promotion, 57a-62a; but in fact the exclusion of those employees

^{19/} Appendix, No. 81-1536, 4th Cir., p. 1117.

simply had no effect on the pattern of disparities revealed by that analysis.^{20/}

The Fourth Circuit's elaborate discussion of statistical methodology reflects a similar approach. The defendants on appeal criticized plaintiffs' expert for using a "one-tail" rather than a "two-tail" analysis of certain statistics. The Fourth Circuit noted that "after all the technical statistical jargon like 'one tail' and 'two-tail' ... were placed before the judge, it was his job to resolve the issues." 243a, n. 16. And then, having noted that this was a question for the trial court, the court of appeals proceeded to hold that the use of a "one-tail" test was improper. 83a-110a. Similarly, the court of appeals insisted that the proper

^{20/} Petition for Rehearing and Suggestion for Rehearing En Banc, No. 81-1536, 4th Cir., pp. 9-12.

manner for calculating standard deviations was the binomial distribution formula, criticizing the trial judge for having "accepted without question" a calculation using the hypergeometric distribution formula. 62a. In fact, however, the trial judge had never questioned use of the hypergeometric method because the defendants had never objected to it at trial, or raised the issue on appeal, circumstances that would ordinarily have precluded an appellate court from even considering the issue.

As the very length and detail of the Fourth Circuit opinion make clear, the widespread differences regarding the use of findings prepared by counsel raises equally serious issues regarding the roles of the appellate courts. The independent factfinding apparent on the face of the Fourth Circuit's opinion would not have occurred in the three circuits which

approve use of such findings, or in the Eighth Circuit which applies to them the usual "not clearly erroneous" rule.

This division among the lower courts stems in part from this Court's past ambivalent attitude towards findings prepared by counsel. United States v. Crescent Amusement Co., 323 U.S. 173 (1945), denounced the verbatim adoption of proposed findings as "leav[ing] much to be desired," and yet insisted "they are nonetheless the findings of the District Court." 323 U.S. at 185. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) complained that such findings were "not the product of the workings of the district judge's mind," and nonetheless held that they were "formally his" and thus "not to be rejected out of hand." 376 U.S. at 656. The confusion and division among and within the courts of appeals will necessarily continue until this Court

resolves the conflicting implications of Crescent Amusement and El Paso Natural Gas by determining when if ever the adoption of findings prepared by counsel is impermissible, and by specifying what if anything the appellate courts are to do when that occurs.

III. The Decision of the Court of Appeals is Inconsistent with Pullman-Standard Co. v. Swint, 456 U.S. 273 (1982).

The briefs in the instant case were filed in the Court of Appeals in February and March, 1982. In April of 1982, this Court in Pullman-Standard Co. v. Swint, 456 U.S. 273 (1982), rejected the Fifth Circuit practice of refusing to apply to findings of "ultimate fact" the "not clearly erroneous" standard of Rule 52(a), Federal Rules of Civil Procedure.

In January, 1983, the court of appeals, apparently unaware of the decision in Pullman-Standard, premised its reversal

of the district court's finding of discrimination on the very "ultimate fact" doctrine that had been disapproved by this Court only nine months earlier. The linchpin of the Fourth Circuit's analysis was its assertion that

the District Court['s] ... statement that "the defendant [had] engaged in a pattern and practice of discrimination ..." [is] a statement of ultimate fact ... not a finding of fact reviewable under the "clearly erroneous" rule (15a)(emphasis added).

This holding is virtually identical to the Fifth Circuit distinction, condemned in Pullman-Standard, that "a finding of discrimination ... is a finding of ultimate fact." 456 U.S. at 286. The decision below expressly relied on a pre-Pullman-Standard Fifth Circuit opinion applying the discredited distinction between ultimate and subsidiary findings of fact. 15a.

In our petition for rehearing below we repeatedly referred to this Court's decision in Pullman-Standard,^{21/} noting that "the panel's reference to 'ultimate fact[s]' is the very concept on which the Supreme Court reversed the Fifth Circuit"^{22/} The Fourth Circuit's refusal to comply with the mandate of Pullman-Standard is neither explicable nor excusable, and warrants summary reversal by this Court.

^{21/} Petition for Rehearing and Suggestion for Rehearing En Banc, pp. 3, 10, 14, 21, 24, 26-28.

^{22/} Ibid. at 27.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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AUG 4 1983

83-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALEXANDER L. STEVAS.
CLERK

SYLVIA COOPER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND.

PHYLLIS BAXTER, *et. al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND.

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE FOURTH CIRCUIT**

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1536

=====

Equal Employment Opportunity
Commission; Sylvia Cooper;
Constance Russell; Helen Moore
and Elmore Hannah, Jr.,

Appellees,

v.

- versus -

Federal Reserve Bank of Richmond,

Appellant.

=====

No. 82-1259

Phyllis Baxter; Brenda Gilliam;
Glenda Knotts; Alfred Harrison
and Sherri McCorkle,

Appellees,

- versus -

Federal Reserve Bank of Richmond,

Appellees.

=====

Appeals from the United States District
Court for the Western District of North
Carolina, at Charlotte.

James B. McMillan, District Judge

=====

Argued: July 21, 1982. Decided: January
11, 1983

Before RUSSELL, WIDENER and HALL, Circuit
Judges.

George R. Hodges (Robert D. Dearborn, Moore
and Van Allen on brief) for Appellant;
Colleen M. O'Connor (Michael J. Connolly,
General Counsel, Philip B. Sklover, Asso-
ciate General Counsel, Vella M. Fink,
Assistant General Counsel on brief); J.
LeVonne Chambers, John T. Nockleby (Cham-
bers, Ferguson, Watt, Wallas, Adkins &
Fuller, P.A. on brief) for Appellees.

RUSSELL, CIRCUIT JUDGE:

This is an action initially begun by
the Equal Employment Opportunity Commission
[EEOC] against the defendant Federal Re-
serve Bank of Richmond. The defendant,
chartered under the Federal Reserve
Act,^{1/} operates a branch in Charlotte,
North Carolina, which provides (1) services

^{1/} 12 U.S.C. § 341, et seq.

to the member banks and the public in the Charlotte area in check collection, adjustment, and provision of cash and securities and (2) services to the United States Treasury and governmental agencies in handling savings bonds and government securities, including food stamp activities. In performing these functions, the bank distributed its various employees, numbering from 350 to 450 in the period 1974-78, largely of a clerical or managerial type, among 16 departments. The job ratings of its employees ranged from pay grade 3 to pay grade 16, with an ungraded officer group of about 8. New employees were generally assigned to pay grades 3 or 4 and assignments among departments were based on "educational background and prior work experience." All employees were evaluated annually on a scale of 1 (unsatisfactory) to 5 (exceptional). Since 1973, the branch

had generally posted notices of vacancies by advertising in Southern Accent, a news circular prepared by and distributed to bank employees. Employees were invited to indicate their interest in any posted vacancy. Promotions were generally made within the work force.

In its complaint the EEOC charged the defendant with engaging in racially discriminatory practices and policies in failure to promote blacks at its Charlotte, North Carolina, branch in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e. After the commencement of the action, four former or present employees of the defendant at the Charlotte branch petitioned to intervene in order to assert under § 1981, 42 U.S.C., and Title VII individual and class claims of racial and sex discrimination "in promotions, wages, job assignments and terms and conditions of

employment" on behalf "of all blacks and females who worked for the defendant at any time since July 2, 1965." The petition to intervene was allowed and the intervenors were, by a consent order, certified as the class representatives to maintain an action charging racial discriminatory practices and policies in the particulars stated in the petition for certification filed by the intervenors but with the class narrowed to include only employees who may have been hired after January 3, 1974. In the same consent order, the EEOC itself agreed to limit its claim of discrimination to "only ... those black persons who worked for the defendant since January 3, 1974."

After joinder of issues and considerable discovery, the actions both of the EEOC and of the plaintiffs-intervenors came on for trial in September, 1980. Following the completion of the trial, the District

Court on October 29, 1980, filed its "Memorandum of Decision." It ruled in this Memorandum: (1) That the defendant had discriminated against the intervenor Cooper "by failing to promote her from her job as a settlement clerk ... to a position as utility supervisor" and against the intervenor Russell "by failing to promote her to a utility clerk position from her position as a utility operator" and "by discharging her ... in retaliation for her filing charges of discrimination with the Equal Employment Opportunity Commission;" (2) that the intervenors Moore and Hannah had not "shown the court that they suffered any discrimination on account of their race" and that their claims should be denied; and (3) that defendant had engaged in a pattern and practice of discrimination from 1974 through 1978 by failing to "afford black employees opportunities

afforded white employees [only] in pay grades 4 and 5." The "Memorandum" concluded with the direction to "[c]ounsel for plaintiffs .. to propose and submit by December 1, 1980: 1. Proposed findings of fact and conclusions of law consistent with the above findings...."

The District Court filed on May 29, 1981, findings of fact and conclusions of law. In these it found discrimination by the defendant in the class action, in pay grades 4 and 5, and in individual discrimination claims of the intervenors, Russell and Cooper. It dismissed the individual discrimination claims of Hannah and Moore. While the District Court, as had the District Court in Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 258 (5th Cir.), cert. denied, 449 U.S. 899 (1980), stated that "[t]he findings and conclusions herein, however, as well as

the Judgment which follows are those of the Court based on an independent review of the record and consideration of the submissions of the parties," such statement was adopted verbatim from the plaintiffs' proposed findings and conclusions; in fact, the statement appears in exactly the same words and in the exact same place as footnote 3 in both the proposed findings and conclusions submitted by the plaintiffs and in the District Court's findings of fact and conclusions of law. Moreover, the Court's 37-page findings and conclusions were almost word for word copies of the finding and conclusions submitted by the plaintiffs.

From the judgment entered pursuant to the findings and conclusions of the District Court, as well as from an order granting an interim allowance of attorney's fees to the intervenors-plaintiffs' coun-

sel, the defendant has appealed. The plaintiffs did not appeal the dismissal of the individual claims of the intervenors Hannah and Moore or the denial of relief in the class claim in all pay grades above pay grade 5. We reverse.

In considering such appeal we shall treat first the decision in the class action claim and, second, the decision on the individual claims of intervenors Cooper and Russell. Before addressing the substantive merits of the class action claim, however, it is necessary to resolve two preliminary points pressed by the defendant. The first of these relates to the nature or type of the class action claims, i.e., are they disparate treatment or disparate impact claims or both? The District Court's "Memorandum of Decision" does not identify the class action claim as either a disparate treatment or a

disparate impact claim but in the findings and conclusions later adopted by the Court it is clear that the class action is being treated as both a disparate treatment and disparate impact claim. The defendant, on the other hand, asserts that the class action should be treated solely as a disparate treatment action. We agree.

In Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 at 273, n.10 (4th Cir. 1980), we stated the necessary elements of a disparate impact claim. These elements, as there declared, are:

"As is not well recognized, the class action commonality criteria are, in general, more easily met when a disparate impact rather than a disparate treatment theory underlies a class claim. The disparate impact 'pattern or practice' is typically based upon an objective standard applied evenly and automatically to affected employees: an intelligence or aptitude test, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d

158 (11971); an educational requirement, id.; a physical requirement, e.g., Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). Both the existence and the 'common reach' of such objectively applied patterns or practices are likely to be indisputable from the outset, so that no real commonality problems for class action maintenance ever arise in this regard. On the other hand, the disparate treatment pattern or practice must be one based upon a specific intent to discriminate against an entire group, to treat it as a group less favorably simply because of its sex (or other impermissible reason). The greater intrinsic difficulty on establishing the existence and common reach of such a subjectively based practice is obvious. See Hauck v. Xerox Corp., 78 F.R.D. 375, 378 (E.D. Pa. 1978). In the instant case, it is clear that plaintiffs' ultimate reliance would of necessity have been upon showing a pattern of disparate treatment. There is no suggestion in the record of a Griggs-type objectively imposed practice having discriminatory disparate impact."

We reiterated those criteria for a disparate impact claim in the recent case of Pope v. City of Hickory, N.C., 679 F.2d 20, 22 (4th Cir. 1982):

"The disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, [such as an aptitude or intelligence test, or height and weight requirements] that can be shown to have a causal connection to a class based imbalance in the [employer's] work force' and has been said not be 'the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices.' Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795, 800 (5th Cir. 1982). It is obvious that the plaintiff is not complaining in this case of some employment practice or procedure of the defendant, which, though neutral or fair on its face, has a discriminatory impact on blacks and thus does not fit within the model disparate impact claim."

It is manifest that the plaintiffs' class action claim does not meet the criteria for a disparate impact claim as those criteria are identified in Stastny and Pope. There was no evidence whatsoever of any "objective standard, applied evenly and automatically" in promotions, such as physical requirement with respect to height, as in Dothard v. Rawlinson, 433

U.S. 321, 324 (1977), or a high school diploma, as in Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971), or a minimum passing score on an aptitude test, as in Albemarle Paper Co. v. Moody, 422 U.S. 405, 410-11 (1975) and Connecticut v. Teal, ____ U.S. ____, 73 L.Ed.2d 130 (1982). The claim here is a pattern or practice of intentional discrimination against an entire group by treating it less favorably because of race. That is the typical disparate treatment case. This case should accordingly be properly treated as such. However, the result reached by us would not be substantially different whether the class action be considered as a disparate impact or a disparate treatment case. Cf., Wright v. National Archives & Records Service, 609 F.2d 702 (4th Cir. 1979).

Secondly, the defendant questions the weight, if any, to be accorded by us to

the findings of fact and conclusions of law in this case. It is defendant's contention that the circumstance that these findings and conclusions were prepared by plaintiffs' counsel at the direction of the District Court and were adopted by the Court practically verbatim weakens, if it does not undermine completely, the reliability of and the weight to be accorded such findings and conclusions.^{2/} There can be no dispute that the District Court itself, in its "Memorandum of Decision," actually make no findings of fact or conclusions of law as those terms are used and construed in Rule 52(a). Fed. R. Civ. P. It confined itself in this Memorandum

^{2/} Both plaintiffs' counsel and counsel for the defendant have submitted to the Court the proposed findings and conclusions as prepared by plaintiffs' counsel. A comparison of such findings and conclusions with the District Court's findings and conclusions supports the statement in the text.

to a purely conclusory statement that "the defendant [had] engaged in a pattern and practice of discrimination from 1974 through 1978 by failing to afford black employees opportunities ... afforded white employees in pay grades 4 and 5." Such a statement of ultimate fact is not a finding of fact reviewable under the "clearly erroneous" rule, and sustainable only if adequate supportive subsidiary findings are made. Hicks v. United States, 368 F.2d 626, 631 (4th Cir. 1966); Castaneda v. Pickard, 648 F.2d 989, 1001 (5th Cir. 1981) (with particular reference to a "discrimination" finding in Title VII actions). Apart from this statement, the District Court stated only that the "[d]efendant [had] not submitted statistical evidence rebutting plaintiff-intervenor's case with respect to discrimination in those grades." It did direct counsel

for the plaintiffs to submit "Proposed findings of fact and conclusions of law consistent with the above [conclusory] findings" of discrimination and of non-rebuttal. It is the findings and conclusions so submitted by plaintiffs' counsel which the defendant attacks as entitled to little or no weight for accepting without question the plaintiffs' contentions as stated in the submitted findings, and for disregarding entirely in those findings the evidence and contentions offered by it.

We, along with other courts, have on a number of occasions- one as recently as a few months ago in Holsey v. Armour & Company, 683 F.2d 864 (4th Cir. 1982)- expressed our disapproval of a trial court's practice of announcing its decision and then requesting the prevailing party to prepare findings of fact and conclusions of law which the court adopts almost word-for-

word in support of its previously announced decision. The reason for such disapproval is inherent in Rule 52(a), Fed. R. Civ. P., a fair compliance with which "requires the trial court to find the fact on every material issue, including relevant subsidiary issues, and to 'state separately' its conclusions thereon with clarity." Kruger v. Purcell, 300 F.2d 830, 831 (3d Cir. 1962); De Medina v. Reinhardt, 686 F.2d 997, 1011 (D.C. Cir. 1982).^{3/}

^{3/} In De Medina, the court said: (p. 1011)

"It is established that the requirement of fact findings cannot be met by a 'statement of ultimate fact without the subordinate factual foundations for it which must be the subject of specific findings.' O'Neill v. United States, 411 F.2d 139, 146 (3d Cir. 1969). Further, the fact findings must touch all material issues. 'For this court to exercise adequately its power of review, the district court must make specific findings about the nature and truth of [plaintiffs'] allegations.' Borrell v. ICA, 682 F.2d 981 at 992 (D.C. Cir. 1982).

As the Court in Sims v. Greene, 161 F.2d 87, 89 (3d Cir. 1947), said in language quoted and approved by us in Consolidation Coal Co. v. Disabled Miners of So. W. Va., 442 F.2d 1261, 1269 (4th Cir), cert. denied, 404 U.S. 911 (1971), "[t]he conclusion is inescapable that since a district court is required by the rule [Rule 52(a)] to make findings of fact, the findings must be based on something more than a one-sided presentation of the evidence," or, as the Court in the same opinion repeated, "[f]inding facts [under Rule 52(a)] requires the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy alone, but by both."^{4/}

See to the same effect: McManus v. Midland

^{4/} Quoted with approval in Hershey-Creamery Co. v. Hershey Chocolate Corp., 269 F. Supp. 45, 48 (S.D.N.Y.).

Valley Lumber Co., 348 F.2d 898, 900 (4th Cir. 1962) ("... must necessarily consider all available evidence bearing upon the issue"); Burgess v. Farrell Lines, Inc., 335 F.2d 885, 889 (4th Cir. 1964); Sligh v. Columbia, Newberry and Laurens Railroad Co., 250 F. Supp. 490, 491 (D.S.C. 1966), aff'd. 370 F.2d 979, cert. denied, 380 U.S. 1007.

This application of Rule 52(a), it is true, does not require the trial court to deal with every piece of evidence in the record or every argument made during the proceeding, whatever their value, but it does mean that "[t]he reviewing court deserves the assurance [given by even-handed consideration of the evidence of both parties] that the trial court has come to grips with apparently irreconcilable conflicts in the evidence ... and has distilled therefrom true facts in the

crucible of his conscience." Golf City, Inc. v. Sporting Goods Co., Inc., 555 F.2d 426, 435 (5th Cir. 1977).

All these considerations prompted the Supreme Court in U.S. v. Crescent Amusement Co., 323 U.S. 173, 184-85 (1944) to comment that the adoption of "findings [proposed by one of the parties to the suit and adopted by the trial judge] leave much to be desired in light of this function of the trial court," under the Rules. This is so because an appellate court will "'feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered' when factual findings were not the product of personal analysis and determination by the trial judge." James v. Stockham Valves & Fittings Co., 559 F.2d 310, 314 n.1 (5th Cir.), cert. denied; 434 U.S. 1034 (1978). Nor is that disquiet, prompted by the trial

court's adoption of one party's findings and conclusions, relieved by any statement in such findings and conclusions that the trial court had "'individually considered' them and adopted them because it 'believed them to be factually and legally correct; [even though] a cursory reading of the district court's memorandum leaves one with the impression that it was indeed written by the prevailing party to the bitter dispute." Amstar Corp v. Domino's Pizza, Inc., supra, 615 F.2d at 258.

The adoption by the District Court of proposed findings and conclusions, though disapproved, will not, however, warrant reversal of the cause per se nor does it mean that the "'clearly erroneous'" rule of Rule 52(a) will not be applied at all, simply because the findings and conclusions were developed by one of the parties and adopted in course by the judge. As the

Court in Flowers v. Crouch-Walker Corp., 551 F.2d 1277, 1284 (7th Cir. 1977), after observing that "the district [had] adopted [in that case] without change findings of fact and conclusions of law prepared by the defendant," said: "[a] critical view of a challenged finding is appropriate where, as where, the findings of fact and conclusions of law of which it is a part were not the original product of a disinterested mind." Again, in Photo Electronics Corp. v. England, 581 F.2d 772, 777 (9th Cir. 1978), the Ninth Circuit expressed itself similarly, declaring that, while "the fact that the trial judge has adopted proposed findings does not, by itself, warrant reversal ... it does raise the possibility that there was insufficient independent evaluation of the evidence and may cause the losing party to believe that his position has not been given the

consideration it deserves. These concerns have caused us to call for more careful scrutiny of adopted findings." See also, United States v. State of Wash., 641 F.2d 1368, 1371 (9th Cir.), cert. denied, ___ U.S. ___, 102 S.Ct. 1001, ("Verbatim adoption of proposed findings of fact by the district court ... calls for close scrutiny by an appellate court"); and Shlensky v. Dorsey, 574 F.2d 131, 149 (3d Cir. 1978) (such adoption requires the appellate court to "examine them more narrowly").

When the findings of fact and conclusions of law adopted by the District Court have been given that "careful scrutiny" by the appellate court that is required under such circumstances and have been "more narrowly" examined than findings and conclusions which, because developed independently by the trial judge, provide

assurance that the District Judge making the findings and conclusions "did indeed consider all the factual questions thoroughly and .. guarantee[s] that each word in the finding [was] impartially chosen," Louis Dreyfus & Cie, v. Panama Canal Co., 298 F.2d 733, 738 (5th Cir. 1962, Wisdom, J.), and when, the reviewing court, on the entire record, "is left [after such review] with the definite and firm conviction that a mistake has been committed," United States v. Gypsum Co., 333 U.S. 364, 395 (1948), or it is convinced that "the result in a particular case does not reflect the truth and right of the case," Armstrong Cork Co. v. World Carpets, Inc., 497 F.2d 496, 501 (5th Cir. 1979), cert. denied, 444 U.S. 932, it is the duty of the appellate court to reverse the findings and conclusions as clearly erroneous.

It is important, too, to note, before

addressing the merits of the case, the limited nature of the district Court's finding of discrimination in the class action, as declared by it in both its "Memorandum of Decision" and in the subsequent findings of fact and conclusions of law adopted by it. In its "Memorandum," the District Court, while finding discrimination in affording "black employees opportunities for advancement and assignment equal to opportunities afforded white employees in pay grades 4 and 5," made it clear that "[o]ther than in the above particulars, [i.e., in promotions in pay grades 4 and 5], however, there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief."

This narrowing of the issues in the class action to promotions out of pay grades 4 and 5 was restated in the later

findings and conclusions. Thus, finding of fact #56, as adopted by the District Court is:

"Except for promotions from pay grades 4 and 5, plaintiffs' and defendant's data ... indicated no statistically significant difference in the initial job assignments and pay grades, performance evaluations or promotion of black and white employees."

The same ruling was included in the District Court's conclusions of law #27:

"The Court concludes that there was no showing that the bank had discriminated against black employees with respect to promotion out of grades 6 and above, and that defendant did not violate Title VII or 42 U.S.C. § 1981 with respect to promotions out of grade 6 and above."

Moreover, the finding of discrimination in pay grades 4 and 5 was one of a pattern and practice of discrimination in those grades. The establishment of a pattern or practice of discrimination requires proof of "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" and depends upon a

finding by "a preponderance of the evidence that racial discrimination was the [defendant's] standard operating procedure- the regular rather than the unusual practice." Teamsters v. United States, 431 U.S. 324, 336 (1977).

With the issues in the class action claim thus limited the District Court proceeded to state its conclusions on those issues (Conclusion #17):

"Black employees assigned to pay grades 4 and 5 have, during the relevant time period, been retained in these grades for longer periods than comparable white employees and passed over for promotion solely because of their race and color. Using two statistical methods, plaintiffs demonstrated disparate treatment by defendant of black employees in these grades, that black employees have been retained in these grades for significantly longer periods even when their relative qualifications are equal to white employees and that the disparate treatment is statistically significant at the 5 percent level."

The Court earlier in its findings had set forth the factual basis for that conclu-

sion. It declared in such findings that the statistical evidence proffered by the plaintiffs and the defendant as well as "[t]he oral testimony of class members" had established "a prima facie case that black employees in pay grades 4 and 5 [had] been denied promotions from these grades solely because of their race," that, in response, the defendant had "offered no explanation for its unfavorable treatment of black employees in pay grades 4 and 5," and "therefore [it found], based on all of the evidence of record, that black employees who [had] been assigned to pay grades 4 and 5 between 1974 and the date of trial [had] been deprived of rights under Title VII." It is manifest from these statements that the District Court's findings and conclusions rest on "the statistical evidence" in the record and "the oral testimony of class members."

Before examining the statistical evidence relied on by the District Court for support for these findings and conclusions, we would review the "oral testimony of class members" which the District Court found supplemented the statistical evidence in establishing discrimination in pay grades 4 and 5. There were only three "class members" who testified, and to whom the finding of supportive "oral testimony of class members" could apply in connection with discrimination in promotions out of pay grades 4 and 5. These were Alfred Harrison, Elmore Hannah and Emma Ruffin, they being the only live employee-witnesses who were members of a class of employees not promoted out of pay grades 4 and 5.^{5/} The claim of Elmore Hannah, one of

^{5/} That only employees in pay grades 4 and 5 were "class members" in evaluating promo-

the three non-promoted witnesses in pay grades 4 or 5, was fully discussed and the District Court made very clear findings on his claim. The Court found that Hannah had been "employed through the Bank's handicapped program" at pay grade 3 and, when tried, at higher grade level jobs, had "failed to demonstrate that he was qualified or able to perform the job positions he requested." His claim was accordingly dismissed by the District Court as without merit. The claim of Hannah was accordingly unavailable as a support for any finding of

5/ continued

tions out of those pay grades is indicated in the District Court's order filed on May 29, 1981, denying intervention by Phyllis Baxter, Brenda Gilliam, Glenda Knott, and Sherri McCorcke because these "were in grades higher than grade 5 [and] are not entitled .. to be treated as members of the class which gained rights in this litigation". It did recognize the rights of Alfred Harrison and Emma Ruffin as members of the class.

discrimination; indeed, the defendant's efforts at placing Hannah in higher level jobs demonstrated, if anything, an absence of discriminatory practice on defendant's part against handicapped blacks. That leaves the "oral testimony" of Ruffin and Harison^{6/} as that of the only "class members," out of the countless numbers who had been employed in these two classes, who could be said to support the statistical evidence on which the District Court rested its findings of a pattern of discrimination, as found in this case.

6/ Ruffin applied, according to her testimony, for a typist position. She, along with other applicants, took a typing test. There is no evidence that her test qualified her for the promotion nor that her qualifications were superior to the person selected. The same is true in the case of Harrison. While the District Court made the bald statement that he "made an adequate showing on the tests for the position," there is no evidence in the record to support a finding that Harrison's

This case accordingly presents quite a contrast with Teamsters where the "oral testimony of class members" demonstrated 40 cases of specific instances of discrimination in support of the statistical evi-

6/ continued

showing on the tests was the same as the one selected for the vacancy, much less that he was only better qualified. It is true he had been in the Army but his only assignment was, by his own testimony, "processing requisitions and in handling computer printouts." See United States Postal Service of Governors v. Aikens, 665 F.2d 1057 (D.C. Cir.), cert. granted, ___ U.S. ___ (1982), 50 U.S.L.W. 3765, discussed later in connection with the plaintiff Cooper's claim. Upon oral argument of this case in the Supreme Court, even counsel for the plaintiff-employee conceded that a prima facie case of alleged discriminatory denial of promotion would be rebutted by a showing of superior qualifications of the person employed over the plaintiff; the contention of the defendant, which was the issue on which certiorari had been granted, was that, in order to establish a prima facie case, superior qualifications of the plaintiff has to be proved. Unquestionably, there is no evidence in this record that either Ruffin or Harrison was superior in qualifications to the person selected for the vacancy in question.

dence offered by plaintiffs or with that in our own case of Chisholm v. United States Postal Service, 665 F.2d 482, 495 (4th Cir. 1981), where there were 20 "class members" testifying of individual discrimination. Here all we have is the testimony of but two class members testifying of individual discrimination in promotion out of either pay grade 4 or pay grade 5 on which a finding of discriminatory practices can be rested. This is even less of a presentation of oral testimony in support of a pattern of discrimination than that found wanting in Ste. Marie v. Eastern R. Ass'n., 650 F.2d 395, 405-06 (2d Cir. 1981), where the Court declared that the small number of incidents of discrimination in promotion over a period of years in that case "would be insufficient to support the inference of a routine or regular practice of discrimi-

nation,"^{7/} or, in Goff v. Continental Oil Co., 678 F.2d 593, 597 (5th Cir. 1982), where the Court held that "even if all three witnesses' accounts of racial discrimination were true, this evidence would not have been enough to prove a pattern or practice of company-wide discrimination by Conoco." It follows that these two incidents of failure to promote Ruffin or Harrison, even if regarded as discriminatory, (which we assume only arguendo), would not support the District Court's finding of a pattern of class discrimination in promotions out of grades 4 and 5 or offer any reinforcement to an inference of discrimination derived from statistical proof under Ste. Marie v. Eastern R. Ass'n. and Goff, there was an absence of

7/ To the same effect, see United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. cert. denied, 406 U.S. 906 (1972)).

sufficient basis for a finding of a pattern of discrimination in promotion out of pay grades 4 and 5.

It is true that a number of "live" witnesses other than Ruffin and Harrison testified for the plaintiffs. This number includes the four plaintiffs Cooper, Moore, Hannah and Russell and certain other past or present employees who moved, after adverse decisions, to intervene as plaintiff-intervenors. This latter group consisted of Phyllis Baxter, Brenda Gilliam, Glenda Knott, Alfred Harrison and Sherri McCorcke. In denying the motion the District Court stated that all intervenors "in grades higher than grade 5" were not members of the class in whose favor the District Court had found "classwide discrimination." By this test, Cooper, Moore, Russell, Baxter, Gilliam, Knott and McCorcke were not members of the class in

which discrimination was found and their testimony could not have been included within the District Court's term "oral testimony of class members," complaining of promotion out of either pay grade 4 or 5; only the testimony of Ruffin and Harrison met that qualifying standard. However, it is interesting to review the employment records of these witnesses, other than Ruffin and Harrison, in order to see how they were promoted out of pay grades 4 and 5. Thus, Baxter hired at pay grade 5, was promoted to pay grade 6 seven months after she was hired. Gilliam,, hired at pay grade 4, was promoted to pay grade 5 within approximately 17 months, and within eleven months afterward to pay grade 6; McCorkle, hired at pay grade 4, had in 24 months been promoted two grades to grade 6; and Knott, hired at grade 5, was promoted to grade 6 within 6 months after employment at the

Charlotte branch. Russell was employed at pay grade 4, was promoted twelve months later to pay grade 5, and within a month or so, to pay grade 6. Cooper was employed initially at pay grade 3, was promoted two months later to pay grade 4, fifteen months later to pay grade 5, and eleven months later to pay grade 6. The intervenor Hannah was found by the District Court not to have suffered discrimination.

The experience of these seven black employees, (Cooper, Russell, Moore, Baxter, Gilliam, Knott and McCorkle) all of whom, with the exception of Ruffin, Harrison and Hannah, had promoted out of pay grades 4 and 5 in periods either less than or equivalent to the average of white employees, far from supporting any proof of discrimination in promotions out of pay grades 4 and 5, represented strong proof of the absence of class-wide discrimination in

promotion out of pay grades 4 and 5; and since Ruffin's and Harrison's testimony, which is the only "oral testimony of class members" that could in any circumstances be said to support a charge of a pattern of class discrimination, is insufficient, the District Court's finding of a pattern of class discrimination can find no support in the "oral testimony of class members" in pay grades 4 and 5 and must find its basis in the statistical evidence and in that evidence alone.^{8/}

Statistics, when properly authenticated constitute an accepted form of circumstantial evidence of discrimination and may sometimes be sufficient to establish

^{8/} It should be noted that the District Court found- and the plaintiffs do not contest this finding- that there was no class discrimination in promotions in pay grades 6 and above.

without more prima facie proof of discrimination. But statistics "come in infinite variety" and their usefulness or weight "depend[s] on all of the surrounding facts and circumstances," Teamsters v. United States, 431 U.S. at 340, and on "'the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn"' therefrom, White v. City of San Diego, 605 F.2d 455, 460 (9th Cir. 1979). Inaccuracies or variations in data or in the formulae used to test such data may easily lead to different, contradictory, or even misleading conclusions by experts. This fact promoted one court to comment that too often statistical conclusions "appear to depend in large part on the side producing them...." Stastny v. Southern Bell Tel. & Tel. Co., 458 F. Supp. 314, 324 (W.D.N.C.) aff'd in

part and rev'd. in part, 628 F.2d 267 (1980). And the sophisticated way in which supporting data may be used in developing statistical models in discrimination cases has lead another Court to caution about "the manipulability of statistics in inquiries of [that] sort," Bilingual Bicultural Coalition, Etc. v. F.C.C., 595 F.2d 621, 625 n.7 (D.C. Cir. 1978), and still another to suggest that Title VII cases too often develop into "contests between college professor statisticians who revel in discoursing about advanced statistical theory" and propounding increasingly complex statistical models. Otero v. Mesa Cty. Valley Sch. Dist. No. 51, 470 F. Supp. 326, 331 (D. Colo.), aff'd., 628 F.2d 1271 (1980).^{9/}

^{9/} This very manipulability of statistical modeling caused the writer in the Note,

We do not mean to suggest that statis-

9/ continued

Judicial Refinement of Statistical Evidence in Title VII Cases, 13 Conn. L. Rev. 515, 525-26 81981), to warn:

"Statistics can be exaggerated, over-simplified, or distorted to create support for a position that is not otherwise supported by the evidence. Samples with built-in biases, unqualified statements of 'average' values, and improper mathematical operations with statistics are areas of statistical manipulation that can misrepresent the data."

In S. Agid, Fair Employment Litigation: Proving and Defending a Title VII Case, 540 (2d ed. 1979), the author speaks of the "legendary amenability of manipulation and abuse" of statistical evidence. And in Wilkins v. University of Houston, 654 F.2d 388, 395 (5th Cir. 1981), vacated and remanded, ___ U.S. ___, 51 U.S.L.W. 3252, October 5, 1982, the Court referred to the "inherently slippery nature" of the statistical evidence.

See also United States v. Test, 550 F.2d 577, 593 (10th Cir. 1976),

"We will not accept movants strategic manipulation of their data for the same purpose of fabricating a 'group' of such size as to circumvent the normal evidentiary requirements of cognizability."

tical conclusions supported by adequate and accurate supporting data and developed through the use of neutral and impartial tests, are not to be given weight, sometimes compelling weight if there is no rebutting evidence, in resolving claims of racial and sex discrimination. We have repeatedly relied on such evidence in a proper case in reaching our decisions and the Supreme Court itself has approved the use of such evidence. In fact, as we said in Equal Employment Opportunity Com'n. v. Am. Nat. Bank, 652 F.2d 1176 (4th Cir. 1981), a "prima facie showing may in a proper case be made out by statistics alone (citing Teamsters,^{10/} Hazelwood,^{11/} and Barnett,^{12/} or by a cumulation of evidence, ^{10/} International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977).
^{11/} Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977).
^{12/} Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975).

including statistics, patterns, practices, general policies, or specific instances of discrimination." Id. at 1188. But statistical evidence, like any other type of circumstantial evidence, "must not be accepted uncritically," Logan v. General Fireproofing Company, 521 F.2d 881, 883 (4th Cir. 1971), and, because of the sophistication and complexity of many of the statistical models being used in discrimination cases by professional econometricians, courts must give "close scrutiny [to the] empirical proof" on which the models are erected, Pettway v. American Cast Iron Company, 494 F.2d 211, 231, n.44 (5th Cir. 1974), in order to guard against the use of statistical data which may have been "segmented and particularized and fashioned to obtain a desired result," Equal Employment Opportunity v. Datapoint Corp., 570 F.2d 1264,

1269 (5th Cir. 1978). As one authority in the field of discrimination litigation, has stated: "[T]he Supreme court's directives in Teamsters and Hazelwood to evaluate statistical proofs clearly in light of all relevant circumstances reinforce decisions like Robinson v. Dallas,^{13/} Olson v. Philco-Ford^{14/} and Keyes v. Lenoir-Rhyne¹⁵ and make clear that in no case should there be a blind adherence to the proposition that mere statistical imbalance equals discrimination." Morris, Current Trends in the Use (and Misuse) of Statistics in Employment Discrimination Litigation, Second Edition, 1979, Equal Employment Advisory

13/ Robinson v. City of Dallas, 514 F.2d 1271 (5th Cir. 1975).

14/ Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976).

15/ Keyes v. Lenoir-Rhyne College, 552 F.2d 579 (4th Cir. 1977), cert. denied, 434 U.S. 904.

Council, p. 51.^{16/} "To be legally cognizable, the pattern [of disparity] revealed must be at least 'significantly discriminatory,' Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977); at minimum, the percentages must be 'markedly disproportionate,' Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 852, 28 L.Ed.2d 158 (1971);" and "[s]tatistical proof failing to show a 'marked disproportion', Griggs, 91 S.Ct. at 852, by

^{16/} For a good illustration of the Court's careful analysis of statistical evidence and its supporting data, see the opinion of Justice Stevens in New York City Transit Authority v. Beazer, 440 U.S. 568, 585-87 (1979) and Chance v. Board of Examiners, 458 F.2d 1167, 1173 (2d Cir. 1972). In the latter case, the Court said:

"After all the technical statistical jargon like 'one-tail' or 'two-tail' tests and 'Chi-Square Test (Yates-corrected)' as well as the less esoteric numbers and percentages [as] were placed before the trial judge, it was his job to resolve the issues."

definition cannot show the 'gross disparity,' Teamsters, at 1856, n.20, necessary to sustain allegations of disparate treatment." Rivera v. City of Wichita Falls, 665 F.2d 531, 534-35 and 535, n.5 (5th Cir. 1982).

Of course, statistical evidence, like any other evidence, is always subject to rebuttal and this rebuttal may assume a number of forms. In Dothard v. Rawlinson, Justice Rehnquist, concurring, said that the defendants in a discrimination case "may endeavor [in rebuttal] to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded." [433 U.S. 338-39] And in Teamsters, the Supreme Court declared that statistical evidence may be rebutted by "demonstrating that [the plaintiff's] proof is either inaccurate or

insignificant." [431 U.S. at 360.] A similar observation was made by us in Roman v. ESB, Inc., 550 F.2d 1343, 1350 (4th Cir. 1976):

"We do not believe that isolated bits of statistical information necessarily made a prima facie case when divorced from other and contrary statistics and from the statistical picture of all the plant. We also think the absence of other evidence of discrimination should be considered in determining whether a prima facie case is made, must as the presence of other evidence of discrimination should be considered in arriving at the same conclusion."

To sum up, statistical evidence is circumstantial in character and its acceptability depends on the magnitude of the disparity it reflects, the relevance of its supporting data, and other circumstances in the case supportive of or in rebuttal of a hypothesis of discrimination. And, in reviewing statistical evidence and its supporting data, the Court must give consideration and evaluate fairly such

conflicting opinions and hypotheses as may have been presented, tempering its conclusion with what one Court has described as "a pinch of common sense." Otero v. Mesa Cty. Valley Sch. Dist. No. 51, [470 F. Supp. at 335].

We should also note an important issue that arises in any review of statistical evidence and this is the determination of the meaning of the term statistical significance in this context.^{17/} There are numerous rules stated by econometricians for determining "statistical significance" in discrimination cases, though as Agid, Fair Employment Litigation, at 541 puts it, "[t]here are no hard and fast rules as to how much of a disparity, is 'enough' to establish a prima facie case or withstand

^{17/} In this context, "[t]he level of significance is a statistical method of identifying the probability that the observed cause-effect relationship (correlative) occurred by chance." Agid, supra, p. 553.

various defenses." Some statisticians base their opinion on the "five per cent level" of disparity in black and white employment as the measuring standard for statistical significance in discrimination cases. A few even in some circumstances, using "a one-tailed probability level to facilitate obtaining 'significant' results," employ a level of 1.64 standard deviations for their opinion of statistical significance. See Friedman, Introduction to Statistics, 146 (Random House, 1972). However, "[t]he adoption of a particular level or test of statistical significance, ... is arbitrary," Smith and Abram, Quantitative Analysis and Proof of Employment Discrimination, 1981 U. Ill.L. Rev. 33 at 43, and a recent commentator has wisely cautioned that "modern statisticians are critical of using five percent or any other level as an absolute standard of significance" in

this connection.^{18/}

The Supreme Court itself, though disclaiming any intention "to suggest that precise calculations of statistical significance are necessary in employing statistical proof," has stated that standard deviations of more than "two or three" rep-

18/ Harper, Statistics as Evidence of Age Discrimination, 32 Hast. L. J. 1347, 1354 (1981).

Baldus and Cole, Statistical Proof of Discrimination (1982) Cumulative Supplement), stated the point well:

"An easily avoided problem is the treatment of the test of statistical significance as a rule of law rather than as an aid to interpretation. A test of significance is treated as a rule of law when the court asks whether the observed disparity is statistically significant at the .05 level or whether it satisfies the two or three standard deviation rule. If the answer is yes, the prima facie case is established or the evidence is credited. If the answer is no, the prima facie case fails or the evidence is disregarded. This approach was never intended by the United States

resent a minimum for statistical significance.^{19/} Obedient to our understanding of this rule of the Supreme Court in Hazelwood School District v. United States, 433 U.S. at 311-12, n.17, and Castaneda v. Partida, 430 U.S. 482 (1977), we have adopted the rule that the proper method for determining "legal significance" on the

18/ continued

Supreme Court in Castaneda and Hazelwood and completely misses the point that in discrimination suits, as in all other contexts, tests of statistical significance and confidence intervals do not lay down arbitrary rules for accepting or rejecting data. Rather the tests provide information to assist one in assessing the degree of reliability of the data and in answering specific questions of interest." § 9.4, p. 88.

See Note, Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal, 89 Harv. L. Rev. 387, 393, n.26 (1975): "Q... what constitutes a substantial disparity has not clearly been resolved.

19/ 32 Hastings L.J., supra, at 1354.

basis of statistical evidence is through the use of standard deviation analysis, and in the cases where either the Supreme Court or we have used that standard, we have followed the binomial distribution test. Martin v. Moultrie, 690 F.2d 1078 (4th Cir. 1982). Moreover, in American National Bank, supra, we held in interpreting the decisions in Hazelwood and Castaneda, as we understod them, that courts "should be extremely cautious in drawing any conclusions [of legal signifcance] from standard deviations in the range of one to three," but that a statistical analysis "with standard deviations of more than three" could "safely be used ... absolutely to confirm" an inference of some "dispar-^{20/}ity." It will be noted that we have

^{20/} We said in Equal Employment Opportunity Com'n. v. Am. Nat. Bank, 652 F.2d at 1192:

done so advisedly for in this connection "statistical significance" to the econometrician may not be and often is not the same as "legal significance," the determination of which, after all, is an issue solely for the court and not for an expert witness.^{21/} This is recognized in Baldus

20/ continued

"From all this we conclude that courts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three. Above this range, with standard deviations of more than three, the analysis may perhaps safely be used absolutely to exclude chance as a hypothesis, hence absolutely to confirm the legitimacy of an inference of discrimination based upon judicial appraisals that disparities are, to the legally trained eye, 'gross.' This we conclude is all that the Supreme Court has ever directly approved by its own use of the process."

21/ See Hallock, The Numbers Game-The Use and Misuse of Statistics in Civil Rights Litigation, 23 Villanova L. Rev. 5, 12 (1977-78): "Statistical significance must be distinguished from 'legal significance.'"

and Cole, Statistical Proof of Discrimination, 308 (McGraw-Hill, 1980) in which the authors state that "what is or is not statistically significant, that judgment is a legal determination properly made by the court and not by an expert." Thus, we emphasize that number comparisons which have statistical significance may not necessarily have legal significance but, while statistical significance principles will not necessarily be legally significant, a finding of legally significant variations based on statistical evidence may not be made in the absence of a finding of statistical significance within acceptable confidence levels in any event.

With these principles in mind, we approach the statistical evidence on which the District Court in this case relied for the result it reached. The centerpiece in the statistical findings made by the

District Court is represented in its Findings #57, which basically consists of two Tables. It was primarily on the basis of these two Tables, as submitted in the testimony of plaintiffs' expert, that the District Court found "statistically significant disparity" in promotions of blacks in pay grades 4 and 5 in this case. These Tables are an exact reproduction of exhibits 43a and 35a (except that the tables in the finding omit the standard error figures as they appear on the exhibits) as introduced by the plaintiffs through their expert witness Dr. Hoffman. These two exhibits purport to show (1) the exact number of employees in the two relevant pay grades of 4 and 5 for the four years in question, (2) the percentage of blacks among such employees, (3) the total promotions in each year during such period, (4) the number of such promotees who were

black, (5) the expected number of black promotees if black promotions had coincided precisely with the black percentage of the overall employee force in the two grades, and finally, (6) the difference between the expected number of blacks promoted in such pay grades in the relevant years.

There are a number of significant facts to be observed about the numbers used in these two Tables which are crucial in any examination of the District Court's findings derived therefrom. First, the number of employees in each pay grade for any one of the four years in issue, as listed in these Tables, is neither "Total Incumbents at Beginning of Interval" (that is, at the beginning of the year in question) nor, as the Tables themselves state, "Total Incumbents at End of Interval" (that is, after the end of the year in question).

The number of employees in the pay grade for any year, as used in the Tables, is the number of employees who were employed in the pay grade at the beginning of that year and who remained in the pay grade at the end of that year. In other words, any employee who quit, was promoted out, or was fired, or was replaced during the year is not counted in this calculation. This method of calculating the employee numbers out of which promotions were to be made in any stated year increased, particularly in pay grade 4, the percentage of black employees over what it would have been had the Tables used the actual number of employees in the pay grade at the beginning of the stated year, or the actual number at the end of the year, or any average of the two.

More important for meaningful analysis than this method of calculating the em-

ployee mass for determination of the sample is the manner in which the expert calculated the number of black promotions made in the grades for each of the years in question. It was undisputed that the actual number of black promotions in pay grade 4 for the years 1974-1977, for instance, was 39 but the Tables used by the District Court gave this number as 35. The reason for the difference is that any employee, whether black or white, who, after promotion might have terminated voluntarily or involuntarily, was simply eliminated from the calculations of black promotees during that year, as set forth in these Tables. Plaintiffs' witness admitted that such a procedure where only the number of black promotees who, after promotions, continued to be employed and not the actual, correct number of black promotions was used in the calculations, "~~change[d]~~ the statistics

dramatically in the case of grade 4. ^{22/}

The reasons assigned by the expert witness for the use of such artificial numbers on promotions of blacks during the relevant years in his Tables were that, to quote the expert, "there may be promotions that are given to individuals which are not permanent in nature, which leave, which the incumbent leaves quickly after he is promoted and for a variety of reasons - either he's going back to school or he's dissatisfied with his work or he's dissatisfied with the promotions or he fails at the promotion and wishes to leave employment." All of these promotees should

^{22/} Actually the testimony of the expert was that after eliminating any black promotee who left the defendant's employ before the end of the year under review and then reviewing the data, "we find that there is now a significant difference in grade 4 no matter what assumption you make and there is also a significant difference in grade 5."

be eliminated in the calculations of annual black promotions in the expert's judgment. The District Court did not inquire into the reasonableness of this justification for the omission of such promotees in stating the number of black promotions for a fair and impartial analysis in the critical years, nor are we able to find any basis in the record for such justification. It seems difficult to assume that when an employee, whether white or black, has requested a promotion to a particular job vacancy (that is the way the evidence shows promotions were generally made) he would be "dissatisfied with the promotion" he had sought and would quit because he got it. Similarly, it is a little odd that, then it is the plaintiffs' contention (which, incidentally, is somewhat specious, as we see later) that it took an average of almost four years for a black to be

promoted out of grade 4, the defendant would be promoting a black schoolboy, whose work life would normally be no more than the three school vacation months and who would quit at the end of his school vacation. Moreover, if the questions is whether the defendant intentionally failed to promote blacks in pay grades 4 and 5 in a particular year, it would seem that the correct test figure should be the actual promotions made in that particular year out of those pay grades. We are unable to perceive any rational basis for using an inaccurate figure for promotions during the pertinent years for black promotions in exhibits 34a and 35a unless it was "to obtain a desired result" of a standard deviation in excess of -2. Cf., Equal Employment Opportunity v. Datapoint Corp., 570 F.2d 1264. Certainly, by reducing the number of promotions, the expert

increased the standard deviation but it was an increase achieved not by analyzing the actual numbers but by reducing the number of the actual promotions, thereby diminishing significantly the validity of any calculation of standard deviation based on such artificial numbers. We find exhibits 34a and 35a are fatally flawed by the manner in which they were prepared and by the assumptions on which they were based.

It is, however, equally interesting to see the method which was adopted without question by the District Court in its critical finding of standard deviations as shown by these Tables. The District Court, in these findings, accepted without question the plaintiffs' expert's calculation of standard deviations in both grades 4 and 5 as shown in exhibits 34a and 35a. There are, however, two tests used in calculating standard deviation in a case such as this.

The first and the one used by the Supreme Court in Castaneda and Hazelwood and by us in American National Bank, is the binomial distribution formula; the other is the hypergeometric distribution formula. Some statisticians indicate that the latter test may be used when small numbers are involved and when these numbers are "finite ... without replacements." Winkler and Hays, Statistics: Probability, Inference, and Decision, 225 (2d Ed. 1975; Holtetc); Hoel and Jessen, Basic Statistics for Business and Economics, 132-33 (2d Ed., 1977; Wiley); Hoel, Introduction to Mathematical Statistics, 67-68 (1971; Wiley). Baldus and Cole, in their 1982 Supplement suggest at p. 82, on the other hand, that the binomial test is proper when the sample is "at least 30" or more.^{23/} The samples in

^{23/} Actually, there is considerable authority for the rule that statistical

exhibits 34a and 35a which incidentally use for the calculations the tables for all four of the relevant years combined and not the tables for one year, are substantial in number and more than meet these minimum number requirements. In pay grade 4 the sample number is 154 and in pay grade 5 it is 269. The size of the sample in either case warrants the use of the binomial test. Moreover, any terminations of employees during the period presumably were replaced and thus the numbers in the sample were not "finite without replacements." It would appear, therefore, that neither of the two reasons generally given for preferring hypergeometric distribution test over the binomial existed in this case. The two

23/ continued

deviations, based on samples of 30 or below, are unreliable.

tests did, though, result in different standard deviations and different standard deviations more favorable to the plaintiffs. The hypergeometric test thus gave larger standard deviation results. This fact is demonstrated by the Table appearing in note 24 below, ^{24/} which is based on the

24/ The method of applying the two tests is:

	N	total blacks in grade	n	p	q	s ₁	s ₂
<u>Year</u>	-	<u>grade</u>	-	-	-	-	-

Grade 4

1974	68	45	43	0.66	0.34	1.90	3.11
1975	41	24	13	0.59	0.41	1.48	1.77
1976	22	15	7	0.68	0.32	1.04	1.23
1977	23	16	3	0.70	0.30	0.76	0.79
total	154	100	66	0.65	0.35	2.94	3.87

				s ₁	s ₂
expected black promotions (np)	action black promotions	dif. b/w expected and actual		standard deviations- (diff. $\sqrt{s_1}$)	standard deviations- (diff. $\sqrt{s_2}$)
28.4*	25	3.4*		1.79	1.09
7.7*	7	0.7*		0.47	0.40
4.8	2	2.8		2.69	2.28
2.1	1	1.1		1.45	1.39
42.9	35	7.9		2.69	2.07

same numbers as are used in exhibits 34a and 35a, comparing specifically the results

24/ continued

	N	total blacks in grade	n	p	q	s ₁	s ₂
<u>Year</u>	-	-	-	-	-	-	-
<u>Grade 5</u>							
1974	80	34	37	0.43	0.57	2.22	3.01
1975	86	44	24	0.51	0.49	2.09	2.45
1976	62	34	31	0.55	0.45	1.97	2.77
1977	41	23	15	0.56	0.44	1.55	1.92
total	269	135	107	0.50	0.50	4.02	5.17

			s ₁	s ₂
expected black promo- tions (np)	action black promo- tions	dif. b/w expected and actual	standard devia- tions- (diff. $\frac{s_1}{\sqrt{n}}$)	standard devia- tions- (diff. $\frac{s_2}{\sqrt{n}}$)
15.9	13	2.0	1.31	0.96
12.2	12	0.2	0.10	0.08
17.0	16	1.0	0.51	0.36
8.4	5	3.4	2.19	1.77
53.5	46	7.5	1.87**	1.45

Table I. BASED ON DATA FROM PLAIN-TIFFS' TABLES 34a and 35a (J. App. at 1117).

[24/ continues on next page]

under both a hypergeometric distribution test and a binomial test (a test, incidentally, the expert did not employ).

It will be observed that in computing the standard deviations in pay grade 5 even under the hypergeometric test, we reach a different result from that which

24/ continues

* Differs from Table 34a because of rounding here to nearest tenth in expected black promotions.

** Unclear how plaintiffs got 2.01 in Table 35a. (i.e., unclear how plaintiffs got s_1 value of 3.73 instead of the correct number 4.02).

N = total in grade

n = total in grade promoted

p = proportion blacks in N

q = proportion nonblacks in N

s_1 = standard error under
hypergeometric test

s_2 = standard error under
binomial test

the plaintiffs' expert 35a showed. Our Table shows a standard deviation of -1.87 and that of the plaintiffs' expert, accepted by and set forth by the District Court in its Finding of Fact #57, is stated as -2.01. The reason for the difference is the difference in what the exhibit (as included in the Appendix at pages 1115-117 but omitted in the District Court's findings) describes as "standard error." In the expert's Table, this figure is 3.73 and in the one used by us is 4.02. The basis on which we arrived at our results is shown in note 25.^{25/} If our computation is cor-

25/ Our formula for calculating the "standard error" and the standard deviation level is under the hypergeometric distribution test as follows (P. Noel, supra, at 70):

$$Se = \sqrt{\frac{N-n}{npq} \frac{N-1}{N}}$$

and

$$Se = \sqrt{\frac{\text{difference from ideal}}{se}}$$

25/ continued

And for the binomial distribution test (as applied in Hazelwood and Castaneda):

$$se = \sqrt{npq}$$

In both, N = total in grade

n = total in grade promoted

p = proportion blacks in N

q = proportion non-blacks in N

Applying the hypergeometric formula to exhibit 35a, the result is:

$$se = \sqrt{107 \times .50 \times .50 \times \frac{269-107}{299-1}}$$

$$= \sqrt{26.75 \times \frac{162}{268}}$$

$$= \sqrt{\frac{4333.50}{269}}$$

$$= \sqrt{16.2}$$

$$= 4.02$$

$$sd = \frac{7.5}{4.02} = 1.87$$

rect, the standard deviation for pay grade 5 was -1.87, which, under the standard null hypothesis, as stated by plaintiffs' expert, would be statistically significant. Further, if we compute the standard deviation under the binomial test for pay grade 4, the standard deviations for grade 4 in exhibit 34a would be -2.07 and for pay grade 5 in exhibit 35a would be -1.45. Neither standard deviation, as derived under the binomial test, would be statistically significant, since for pay grade 4 the deviations are but marginally over -2, and for pay grade 5 well below -2. Moreover, there are, as we shall see later, special circumstances which render the standard deviation in pay grade 4, even calculated as the plaintiffs' expert did under the hypergeometric test as -2.69, to be without legal significance.

The District Court cited and relied on

another Table prepared by plaintiffs' expert. It was described by the expert as a "buddy" study in which, as he explained it, he sought to match black and white employees, with similar lengths of service, similar grades, similar educational levels, similar department and similar lengths of service in grades. The number of matches covered but a fraction of the defendant's workforce, and their number was not confined to employees in pay grades 4 and 5 but embraced employees selected from all levels of defendant's workforce. If we accept the expert's opinion that the study indicated discrimination in promotions between white and black employees, then the study would have indicated discrimination at all levels of employment in the Bank and would actually contradict the District Court's express findings that discrimination in promotions was confined

to pay grades 4 and 5. It is unnecessary, however, to examine the reliability of this aspect of the study, since it was conceded by the expert that such study showed a finding of -1.79 standard deviations, which he said was ".037," evidence of disparity between black and white employees in promotions, or well below the standard of "between two to three," or even -1.95.

It was obvious at this point in the expert's testimony that he had given no firm opinion on this aspect of his study which would support a conclusion under the econometrician's standards of statistical significance in promotions out of pay grades 4 and 5. The plaintiffs' counsel apparently recognized this and, in seeking to overcome this obvious deficiency in proof, requested the expert to explain at this point "what does this (i.e., the buddy study) tell us about '74 through '77

with your buddy system." To that question the expert replied, "[t]hat if you had reason to believe that blacks were being treated differently than whites, that there was a significant difference." Apparently finding the answer ambiguous, counsel followed that answer with this question to his own expert:

- Q. Must we assume that there was a difference in order to reach a conclusion?
- A. If you assume that there was no difference and that blacks at this point in all of the studies that I've done were equally likely to be above or rated more highly than whites and promoted at a faster rate than whites as they were to be promoted at a slower rate than whites, you would have a 'P' value that was approximately twice as large as that, or .07, or 7 times to 100. Using the standard on a two-tailed test of 5 percent you would not have a significant difference.

When the expert gave this explanation of his results, the District Judge interrupted to inquire, "I say where in this data is

it possible statistically to generate a hypothesis [or 'presumption'] which will beef up the actual results of the statistical analysis? where then does that hypothesis come from that race played a part?" (Italics added) The expert's answer was:

- A. The two-tailed test or the test that assumes that blacks are as equally likely to be higher as they are to be lower, which is the alternative. In statistics you say, I believe that there is no difference. You then look to see if there is some relationship in this case between race and promotion. If you truly have no reason to suspect that blacks would be higher or lower, you must use the two-tailed test, but in an experimental design, for instance, where there is a substantial amount of information gathered prior to performing the study that indicates that there is a relationship between race or between what you're studying and an outcome --

Court: Are you saying that if you draw the conclusion by inspection that the figures are skewed on a racial basis then your statisti-

cal opinion depends of [sic] whether you put the question in the positive or negative?

- A. Yes, and if you assume that the processes that are gone through in order to determine whether or not discrimination has occurred in order to get a right to sue letter or in the initial evaluation that there is a reasonable chance that it could have occurred in this spot is a proper assumption, you have the ability to use a stronger and a more powerful alternative hypothesis.

After hearing the expert's explanation, the District Judge inquired: "You weren't stating the hypothesis that is the speculative proportion that you're going to test against the figures you've got. You're talking in terms of a presumption or a reason to start out favoring one side or the other of the question." (Italics added) To that inquiry the expert responded: "It is a presumption, yes." Under these admissions of the expert, a finding of statistical significance, of a

magnitude sufficient to support, even for the econometrician, an inference of discrimination could only be arrived at if one begins his review of the statistical evidence with a "stronger and more powerful alternative hypothesis" or "presumption" and one that admittedly favors the plaintiff in a discrimination case that there is "a reasonable chance" that there has been discrimination. Such an assumption, which arbitrarily favors one party to the controversy, cannot be considered a reliable basis for a finding of discrimination.

Moreover, any finding of discrimination in this case, based on the statistical evidence is compellingly rebutted by two other Tables prepared by the expert before he produced the Tables in exhibits 34a and 35a. These Tables were listed in the record as exhibits 34 and 35 and covered employees in the pertinent pay grades 4 and

5 for the same four years as exhibits 34a and 35a. Such Tables began by taking as the employee pool in the two relevant pay grades for analysis the "Total Incumbents [in those pay grades] at Beginning of Interval." Unlike the numbers in exhibits 34 a and 35a, this is an accurate and exact number, and similarly, in setting forth the "Total Black Promotion" in any given year within the relevant time period for both pay grades the actual number of black promotions made during the year was used. In short, these Tables deal with actual, not artificial or tailored numbers and they present a precise picture of the percentage of black promotions in the relevant years for pay grades 4 and 5. The results stated in terms of standard deviations, as measured by the binomial test, are significantly different than those in the exhibits relied on by the District Court, i.e.,

-1.52 for pay grade 4 and -1.24 for pay grade 5, as shown by the compilation appearing in note 26.^{26/}

26/ The exhibit as prepared by plaintiffs' expert for "Promotions Out of Grade 5" in exhibit 35 lists the standard deviation for black promotions in that pay grade for the years in question as 02.24. This is the figure the witness used in his testimony. Such calculation, however, is erroneous. The error in the expert's calculation arose out of his own calculation of the difference between total black promotions and expected black promotions in that grade. He lists the difference as -8.80. Actually, the difference between 58.80 and 52 is 6.8 and not 8.80. This error is apparent on the fact of the exhibit itself. Yet it is on this erroneous calculation that the expert testified that, "using a hypo-geometric [sic] difference" of -2.24 between black and white promotions out of pay grade 5 is shown in exhibit 35.

	N	total blacks in grade	n	p	q	s ₁	s ₂
<u>Year</u>	-	-	-	-	-	-	-
<u>Grade 4</u>							
1974	85	52	47	0.61	0.39	2.25	3.34
1975	51	31	14	0.61	0.39	1.57	1.82
1976	33	21	9	0.64	0.36	1.25	1.44
1977	30	20	3	0.67	0.33	0.79	0.81
total	199	124	73	0.62	0.38	3.31	4.15

[26/ continues on next page]

26/ continued

expected black promo- tions (np)	action black promo- tions	dif. b/w expected and actual	number ^{s1} standard devia- tions- (diff. ($\frac{s_1}{n}$))	number ^{s2} standard devia- tions- (diff. ($\frac{s_2}{n}$))
28.7	27	1.7	0.76	0.51
8.5	8	0.5	0.32	0.27
2.9	3	2.8	2.24	1.94
2.0	1	1.0	1.27	1.23
45.3	39	6.3	1.90*	1.52

	N	total blacks in grade	n	p	q	s ₁	s ₂
<u>Year</u>	-	-	-	-	-	-	-

Grade 5

1974	92	39	39	0.42	0.58	2.35	3.08
1975	107	53	28	0.50	0.50	2.28	2.65
1976	79	41	37	0.52	0.48	2.23	3.04
1977	45	24	16	0.53	0.47	1.62	2.00
total	323	157	129	0.49	0.51	4.35	5.48

expected black promo- tions (np)	action black promo- tions	dif. b/w expected and actual	number ^{s1} standard devia- tions- (diff. ($\frac{s_1}{n}$))	number ^{s2} standard devia- tions- (diff. ($\frac{s_2}{n}$))
16.4	14	2.4	1.02	0.78
14.0	14	0	0	0
19.2	19	0.2	0.09	0.07
8.5	5	3.5	2.16	1.75
58.8	52	6.8**	1.56	1.24

[26/ continued on next page]

It will be observed that under Tables 34 and 35 the standard deviations, computed under the binomial test, are such that "the hypothesis that the [selection process] (for black promotions in pay grades 4 and 5) ... would be suspect to a social scientist," is not proved.^{27/} The expert, however, did not use the binomial test in his Tables; he used again the hypergeometric test. The expert conceded that the standard deviation difference between whites and blacks in promotions out of pay

26/ continued

Table II. BASED ON DATA FROM
PLAINTIFFS' TABLES 34 and 35
(J. App. at 1115).

- * Values differ slightly from Tables 34 and 35 because of rounding here to nearest tenth in expected black promotions.
- ** Erroneously recorded in Table 35 at 8.80.
- *** Unclear how plaintiffs got ^s1 value of 3.93.

27/ EEOC v. American National Bank, 652 F.2d at 1192, quoting from Castaneda, 430 U.S. at 497, n.17.

grade 4 for the pertinent years under the hypergeometric test, as shown by these tables, was -1.89. On the statistical significance of this result, he testified:

"A 1.89 standard deviation difference between blacks and whites. This is a significant difference, if one makes the assumption that it's reasonable to believe that blacks have been discriminated against. The value of that standard error given that assumption is 1.65 standard errors. That corresponds to 5 times in 100. If one makes the assumption that I don't know, that I can't tell and I have no reason to believe whether blacks were discriminated against or not, that is not a significant difference at the .05 level, which I believe the standard error would be 1.95.

"Q So for the year 1974 does this table reflect that blacks have not promoted out of grade 4 on a comparable basis with whites?

"A Not statistically."

As the Court remarked, after hearing this testimony:

"... to give any meaning to the conclusion expressed in Table 34 [sec. 4] you've got to have pretty well decided the case before you read Table [sec. 4] 34?

"That's true."

The expert did testify that exhibit 35 showed a significant statistical disparity in grade 5 under a hypergeometric test, (i.e., -2.24), ^{28/} But, as we have already seen, this was because of the expert's own

^{28/} "COURT: Why don't we go to Table
^{35/}

"A Table 35 is the same for grade 5 as the previous table was for grade 4. In that table if we sum across all individuals, we find a significant difference between blacks and whites.

"Q What is the standard deviation of Table 35?

"A 2.24, using ^a_{30/} hypergeometric distribution.

"A Is that a statistically significant difference?

"A Yes, it is.

error in calculation.^{29/} The correct figure was such that (i.e., -1.56), even under the expert's own test it would not have been statistically significant. It follows that in both cases the standard deviation is less than -2.

It will be noted that the expert would test the results of his calculations of

28/ continued

"Q Does one need to make the same assumption in 35 that one needs to make in 34 as to --

"A No.

"Q -- as to whether there has been discrimination before finding that significant difference?

"A No."

29/ See note 26.

30/ It will be observed that the expert is basing this opinion upon his own incorrect computation of the standard deviations resulting from the numbers in the exhibit. See note 26. If we use the correct deviation level, this number is similarly not statistically significant.

standard deviations both in exhibits 34a and 35a and in his buddy studies (but, significantly, not exhibits 34 and 35) by a "one-tail" test of significance and it is on the basis of this test that his opinion of statistical probability of discrimination rests. Since the findings of the plaintiffs' expert thus depend on the use of the "one-tail" test, it is necessary to understand first the difference between a "one-tail" test and a "two-tail" test and to determine under what circumstances, if any, it is proper to use a "one-tail" test. The "two-tail" test, which was the one used by the Supreme Court in Castenada and Hazelwood, and which, as we have already noted, is the other test used in this connection, proceeds on the basis of a "null hypothesis," which was described by us in American National Bank at page 1191 as "the hypothesis that underrepresen-

tation of a protected minority group in any sample made up of a protected and nonprotected group (binomial distribution) might be attributable to normal fluctuations of chance rather than to discriminatory design." In the application of this "One-tail" test to any compilation, however, one begins with the assumption or hypothesis, based on other evidence than that in the actual compilation being analyzed, that the defendant has been guilty of discrimination and adjust the results on the basis of that assumption. The difference in result between the two tests is significant and dramatic. Plaintiffs' expert conceded as much, and this is evident from the standard themselves for determining statistical significance under the two tests. The rule in Castaneda and Hazelwood requires standard deviations in the range of "more than two or three," and

under the "two-tail" test, as often stated by statisticians "about two" standard deviations are the necessary predicate for a finding of statistical significance under the view of some social scientists. But when the "one-tail" test is used, the plaintiffs' expert testified that 1.65 standard deviations warranted a finding of statistical significance.^{31/}

Both the District Court and the plaintiffs' expert recognized that the "one-tail" test is a dramatically stricter standard for statistical significance than the "two-tail" test. In fact, the court in Brown v. Delta Air Lines, Inc., 522

^{31/} As we have already observed, many statisticians today frown on a blanket statement of statistical significance, based on any specific number of standard significance and suggest that the disparity shown by the calculation of standard deviation is just one circumstance to be weighed by the trier of fact. We do not need, however, to address this question here beyond noting the contrary views among statisticians.

F. Supp. 1218, n.14 (S.D. Texas 1980), declared, on the basis of Dr. Hoffman's testimony to such effect in that case, that,

"Moreover, Dr. Hoffman's use of a one-tailed, rather than two-tailed, test favors the plaintiff's viewpoint even further (because with a one-sided test, it takes less of a variation from expectation to reach '.05 significance')."

A commentator has made the same observation about the "one-tail" test, describing it as "'data mining' per se which is "the statistician's term for manipulating data to prove a desired result." Harper, supra, 32 Hastings L. J. at 1355, n.65, citing Freedman, Pisani and Purves, Statistics, 94-96 (1978). Still another text is more specific in its description of the "one-tail" test. In Friedman, Introduction to Statistics, 146-47 (Random House, 1972), the author explains:

"Note that, although at value of 1.96 is required to reject H_0 at the 5 percent level with a two-tailed test, a value of only 1.64 is needed if a one-tailed test is used. Many investigators find it tempting to use a one-tailed probability level to facilitate obtaining 'significant' results.

"... the safest procedure in virtually all situations is to use two-tailed values. Using one-tailed values to make rejection of H_0 (i.e., the null hypothesis) 'easier' serves to increase type I errors, while the size of the difference, as measured by r_m is unaffected. A strict application of overlooking important results in the nonpredicted direction, and any attempt to test for such outcomes leads to inaccurate probability values. Analysis of data based on two-tailed probability levels can be reported without apology, while it is almost always necessary to 'explain away' the use of one-tailed probability levels."

The District Court itself characterized the use of the "one-tailed" test in this case as a method of "beef[ing] up" the statistics and the expert himself employed the adjectives "stronger" and the "more powerful" in his characterization of the

test in his exposition of the test. Because of this fact (i.e., the more favorable aspect of the "beef[ed] up" test for the plaintiffs in a discrimination claim), plaintiffs' expert testified that its use in any case is conditioned upon the presence in the record of other evidence which would justify a belief or an assumption that the defendant had been guilty of discrimination. The evidence in this case which, according to the expert, justified the use of such test in this case, consisted of certain data gathered by him and incorporated in exhibits identified and introduced before introducing exhibits 34 and 35. Such evidence, at least that which it thought pertinent, was presumably that which was identified by the District Court in its findings before it accepted the results of the expert's "one-tail" test results. Whether the use of the "one-tail"

test was appropriate in this case even under the expert's theory thus depends on whether this evidence on which the District Court relied was sufficient to generate a legitimate belief or assumption of discrimination. Though we do not conclude that this is a case in which the "one-tail" test should have been used in any event, we have reviewed the evidence cited and relied on by the expert for his assumed justification for his use of the results of the "one-tailed" test.

In his assumed justification, the plaintiffs' expert relied on multiple regression studies, submitted by him in addition to exhibits 34, 35, 34a, 35a. Similar studies were offered in Stastny v. Southern Bel Tel. & Tel. Co., supra, 628 F.2d 267. The District Court commented on the reliability of such studies thus:

"Regression analysis begins with the assumption that certain independent variables in fact determine the outcome of decisions to raise pay and promote. Such assumptions are intellectually questionable and not grounded upon any solid evidence." 458 F. Supp. at 323. 32/

Whether this is a fair comment on regression studies is a matter we need not concern ourselves with in this case. The studies in this case are insufficient, even under the expert's faulty theory of justification, to provide a reasonable basis for an inference, hypothesis or belief that the defendant had been guilty of discrimination. We accordingly proceed to examine the studies on which presumably the District Court justified its approval

32/ For a more favorable view of multiple regression studies, see Fisher, Multiple Regression in Legal Proceedings, 80 Col. L. Rev. 702 (1980) and Finkelstein, The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases, 80 Col. L. Rev. 737 (1980).

of the expert's use of a "one-tail" test in establishing statistical significance by its standards in this case.

The first multiple regression of the studies to which the District Court referred in his findings was a comparison of earnings of black employees for the defendant's workforce taken as a whole. The records used by the expert, however, show that there was a greater percentage of whites in the upper pay grades than blacks. This, as the District Court found, could not have been because of any "significant difference in initial job assignments and pay grades, performance evaluations or promotion of black and white employees;" the District Court expressly found that there was no difference.^{33/} Moreover, almost all the employees in the managerial

33/ Finding of Fact #56.

category, which consisted of the higher pay grades, were long-time employees; in fact, the employment of many of them extended back beyond the effective date of the Act itself. In addition, the expert's studies did not show that there was any discrimination in pay rates between whites and blacks in pay grades 4 and 5. Moreover, there was a greater proportion of white employees in the higher clerical levels than of black employees, though the proportion of blacks in these pay grades was considerably above the proportion in the black force qualified for such pay grades, according to the defendant's figures. It would seem reasonable to assume that, because of the greater concentration of whites in pay grades above pay grade 5 carrying higher pay rates than pay grades 4 and 5, white employees, taken as a group throughout the defendant's work force, would receive higher wages than

blacks. For this reason (the inclusion of all employees, those at the lowermost level of pay and those at the highest), regressive tables involving an overall comparison of salaries of employees have been widely dismissed by the courts as completely unreliable.

In Agarwal v. Arthur G. McKee and Co., 19 FEP Cases 503 (N.D. Cal.), aff'd. 644 F.2d 803 (9th Cir. 1981), the plaintiffs, just as plaintiffs' expert here, attempted to use a regressive analysis in support of discrimination based on a comparison of salaries of minority and non-minority employees at all pay levels in an employer's work force. In finding the study meaningless, the Court said (p. 512):

"[P]laintiff's regression analyses contain a number of defects. Plaintiff failed to treat salary as a function of job position and salary grade. Furthermore, plaintiff treated all job positions as fungible, involv-

ing equal levels of knowledge, skill, and responsibility. Therefore, plaintiff's statistics do not refute defendant's contention that salary differences between minorities and non-minorities within each job position are not substantial." (Italics added).

Valentino v. U.S. Postal Service, 511 F. Supp. 917, 957 (D.C.D.), aff'd., 674 F.2d 56 (1982), involved the use of a like comparison of salary difference for the defendant's workforce as a basis for a claim of racial discrimination in salary. Again referring to the erroneous treatment of "all jobs as fungible" and finding the study unreliable, the Court said:

"Plaintiff treated the wide variety of positions in USPA Headquarters at level 17 and above as fungible items. For example, her regression compared the position for the Postmaster General to that of his secretary. Common sense dictates that these positions are not comparable, are not fungible, and that any difference in salary cannot be presumed to be the result of sex discrimination by the USPA." 34/

34/ see also Ste. Marie v. Eastern R.

Again, the Court in Vuyanich v. Republic Nat. Bank of Dallas, 505 F. Supp. 224 at 280 (N.D. Tex. 1980), dismissed as valueless salary comparisons between white and black employees at all levels of employment on the issue of discrimination. The Court said:

"Not surprisingly, where an employer has employees in differing occupations and of different backgrounds, a simple comparison of the average wage of all white employees and all black employees (or all male employees and all female employees) will not be enough to prove salary discrimination. see, e.g., Pouncy v. Prudential Insurance Co. of America, supra at 449 [499 F. Supp. 427] Prac. Dec. n.66, at 16, 751 ('The Court believes that the proper inquiry in an

34/ continued

Ass'n., 650 F.2d 395 at 400 (2nd Cir., 1981) where, in dismissing a comparison of salary gap between male and female employees at all levels, Judge Friendly said "that the gap between male and female employees in salary and salary expectations occurred because of the low representation of women in higher salaried positions."

analysis of salaries by race should focus on whether black and white employees with the same tenure at the same job level are paid the same salaries')...."

Keely v. Westinghouse Electric Corp., 404 F. Supp. 573 (E.D. Mo. 1975) is another case where a salary comparison was attempted to be used to support an inference of discrimination. The Court dismissed, as "meaningless" the evidence, saying:

"Plaintiff has submitted evidence showing that blacks were earning less on the average than were defendant's white employees. Such statistics, however, are meaningless without more. Were evidence produced which showed that black employees with the same length of employment and the same qualifications were paid lower rates for similar jobs, or that no black employee earned more than any white employee, this Court might feel compelled to conclude that the disparity was due to racial discrimination."35/ [p. 578]

35/ To make plain its opinion of such evidence, the Court in that case added (p. 579):

Similarly, in this case, the salary comparison referred to in the District Court's findings and used by the plaintiffs' expert as a basis for his "hypothesis" or belief of discrimination against the defendant treated the vice president of the bank as comparable to the cafeteria waitress and considered the eight officers (all of whom are above the pay grade 16) as comparable with employees in pay grade 3, the lowest pay grade in the existing workforce of the defendant. Many other comparisons, almost as lop-sided, could be cited as demonstrating the same flaw. Just as the court ruled in Valentino and in Ste. Marie, this table of salary comparison can-

35/ continued

"This leads the Court to conclude that too many use statistics as a drunk man uses a lamppost--for support, and not illumination."

not be used to give support to any presumption of discrimination. Moreover, we are concerned solely with alleged discrimination in pay grades 4 and 5. It would have been appropriate, however, if we had compared wages in those pay grades alone. See Vuyanich, supra, 505 F. Supp. 224. Yet the fact is that the District Court found that there was no discrimination in pay in any specific pay grade, including pay grades 4 and 5.

A second set of statistics cited by the District Court relates to the assignment of employees "to cleaning positions and the Cafeteria" and to assignments in pay grades 6 to 14. We are unable to find any basis for presuming discrimination on this basis since the District Court both in its "Memorandum of Decision" and in its findings concluded that there was no pervasive evidence of discrimination in the

job assignment of employees. Moreover, the employment records reviewed by the plaintiffs' expert demonstrated that over 85% of the bank employees employed in service and cafeteria jobs had requested that type of work and/or that their work experience before hiring was in that type of work. So far as those blacks employed in this work who had not requested jobs in those departments, they, with hardly an exception, had submitted records that indicated work experience only in those areas and, in particular, had no background in clerical work. It is agreed in the District Court's findings that initial employees when employed, were assigned, whether they were black or white, on the basis of "educational background and prior work experience." In view of the District Court's finding of no discrimination in assignments, it is difficult to understand

how the expert could have relied on assignments for his presumption of discrimination.

The District Court also made a finding, based on some data prepared by the expert, that "Fifty-three (53) percent of the black employees, however, were in pay grades 6 and below, as compared with 26 percent of the white employees." This, too, was cited and relied on as authority for a belief that the defendant had engaged in discrimination. What, however, this finding fails to note is that, for pay grades above grade 6 added qualifications are required. There is in the record the percentage of black employees in pay grades 7 to 13 which are the pay grades requiring special qualifications. The percentage of black employees of the defendant in such pay grades is 17.5 percent as compared with a 10.4 percentage

of blacks having such special qualifications in the qualified black labor force in the Charlotte employment area as shown by official Labor Department figures. Moreover, the District Court itself found as a fact, and the plaintiffs have not disputed such finding, that there has been no discrimination in promotions or hirings in pay grades 6 and above or in job assignments or in pay in such grades. If this fact be assumed (and the District Court so found) it would appear impossible to derive an inference of discrimination based on a comparison of black and white employees in those pay grades. The situation here is similar to that in Pouncy v. Prudential Inc. Co. of America, 668 F.2d 795, 801-02 (5th Cir. 1982), in which the plaintiffs in a discrimination case made a like contention based on a statistical table which "show[ed] that, on a whole,

blacks [were] overrepresented in the lower levels of Prudential's work force." The Court dismissed such evidence as meaningless, saying:

"But this might result from any number of causes. Absent proof that the disparate impact is caused by one or more of the challenged employment practices, we do not require the employer to justify the legitimacy of any (or all) employment practices.

In this case, any disparity reflected in this table could not, as we have said, be the result of any discrimination in hiring or assignment; the District Court has found the absence of any such discrimination and the plaintiffs have not excepted to that finding. If it be said it is due to discrimination in promotions out of pay grades 4 and 5, the statistical evidence in the table submitted by the plaintiffs will not support such a finding, if we follow Hazelwood and American National Bank test (statistical deviations in the range of

about two or three," with only the existence of at least three deviations being sufficient for an absolute inference of discrimination).

The District Court noted that there was a disparity in the average time rate of promotions out of pay grade 4 (but not pay grade 5) between white and black employees in the expert's studies. However, the studies compiled by plaintiffs' expert showed the comparative rates in promotion overall of black and white employees and in pay grades 4 and 5 for the relevant years. Specifically, the expert testified that black employees had less or equivalent time at the bank in each of the grade levels above grade 4 (that is, for pay grades 5 and above), in all the years in issue and that "the promotion rate of blacks [all grades included] was greater than for whites" in the same years.

Moreover, the studies prepared by the expert himself in connection with his regressive studies, indicated quite clearly why there should have been a disparity in promotion of blacks out of grade 4. These studies showed that a far greater proportion of black hirees brought to their employment an experience in service and cafeteria jobs than white hirees and, conversely, the white hirees brought a far greater work experience in clerical work than black employees. Since it was found that job assignments for hirees were based on educational background and work experience, it was reasonable to expect that a far greater proportion of black hirees than white hirees would be assigned to service and cafeteria jobs and that a far greater proportion of white employees than black employees would be assigned to clerical jobs. And these expected assignments of

black and white hirees were justified by the admitted fact that a far greater proportion of black hirees than white hirees requested service and cafeteria jobs and a far greater proportion of white hirees than black hirees applied for clerical jobs.

In a bank where the opportunities for promotion primarily were in the clerical or office fields, it is to be expected that those whose work and experience were in those fields would have an advantage in promotions over employees in service and cafeteria jobs.^{36/} Experience in cafeteria or in cleaning hardly offers training that qualifies one for clerical work in a bank

36/ See Ste. Marie, (650 F.2d at 401):

"There is no principle requiring an employer following a policy of promoting from within to make this applicable across the board rather than only to those employee groups whose work gives them the opportunity to acquire the skills needed for promotion."

such as a Federal Reserve Bank. These are the very reasons which prompted the Court in Ste. Marie to find flawed statistics showing disparity in the employment of whites over minorities in a discrimination case. In that case, Judge Friendly said:

"Plaintiff's statistics were hopelessly flawed by the lumping of these secretarial jobs into the clerical category, since these positions did not offer the incumbents the opportunity to acquire the skills and experience that would enable them to qualify for promotion to technical and still less to managerial posts. There is no principle requiring an employer following a policy of promoting from within to make this applicable across the board rather than only to those employee groups whose work gives them the opportunity to acquire the skills needed for promotion. Yet plaintiff's statistics gave the same weight to failure to promote secretaries and typists to posts requiring specialized substantive knowledge and experience as they did to failure to promote women working in other clerical positions that would permit them to obtain the essential skills. This methodology failed to heed the warning in Hazelwood School District v. United States, supra, 433 U.S. at 308 n.13, 97 S.Ct. at 2742 n.13: 'When special

qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." [pp. 400-01]

See also Pouncy v. Prudential Inc. Co., supra, 668 F.2d at 804. The difficulty in our case, as it was in Ste. Marie, is that the difference in the experience acquired on the job assigned in a non-discriminatory way may reasonably account for promotion to higher clerical jobs, rather than discrimination. These considerations are the manifest reasons for the disparity in promotions between whites and blacks at the grade 4 level in this case. They should have been noticed and taken account by the plaintiffs' expert in his calculations as well as by the District Court. They do not justify a presumption for discrimination in connection with promotions at pay grade 4.

It follows that, assuming for the moment, it was permissible for plaintiffs' expert to look to other statistics in order to justify the use of the "one-tailed" test which was favorable to the plaintiffs, the fact is that none of the statistics he relied on fairly would have justified the assumption of discrimination on which he predicted his right to use this "one-tailed" test. We repeat, however, that we are not persuaded that it is at all proper to use a test such as the "one-tailed" test which all opinion finds to be skewed in favor of plaintiffs in discrimination cases, especially when the use of all other neutral analyses refutes any inference of discrimination, as in this case.

Finally, in summary, the expert's opinion on statistical significance based as it is on the use of both the hypergeometric test and the "one-tailed" standard

of statistical significance, which, as we have seen, is the linchpin for the District Court's conclusion of discrimination, depends for any meaning on the complete acceptance of a sequence of dependent adjustments made in the relevant data and applicable formulae, as demonstrated by our review of the plaintiff's statistical evidence, coupled with a complete disregard of all contrary conclusions evident in the statistical evidence. To recapitulate, we begin this sequential review with exhibits 34 and 35, as prepared initially by the plaintiffs' expert (never discussed in the District Court's Findings) which use the actual promotions of blacks over the relevant period 1974-78 in the pertinent pay grades of 4 and 5. If we apply in these exhibits the binomial test, followed in Castaneda and Hazelwood and accepted by us in Moultrie, and American National Bank,

supra, 652 F.2d at 1193, n.12, for determining the applicable standard deviations for measuring any disparity in promotions out of pay grades 4 and 5, the result in standard deviations for disparity in promotions of black employees stated in both pay grades show a variance well below 2 (i.e., -1.52 in pay grade 4 and -1.24 in pay grade 5).^{37/} Even if we use the hypergeometric, rather than the binomial, test, as did plaintiffs' expert in his statement in his tables 34 and 35, the result in standard deviations is below 2 (i.e., 1.90 in pay grade 4 and 1.56 in pay grade 5). There was thus no basis for a finding of statistical significance as a result of tables 34 and 35, irrespective of whether

^{37/} It will be noted that the standard deviations under this test are actually less than the 1.65 standard, stated by plaintiffs' expert, for a "one-tailed" test.

one employs the binomial or the hypergeometric test. These tables are not mentioned in the Findings proposed by the plaintiffs and adopted by the District Court.

The expert's presentation then shifts to exhibits 34a and 35a. In these exhibits, accepted by the District Court and included in its Findings, the expert, has, however, changed the number of employees in the sample, both overall and divided between white and black, and more importantly, changed the number of actual black promotions made during the relevant years. In these samples, a number of employees in the pay grades and a number of the black promotions are eliminated. With the pertinent data thus abbreviated, the expert came up with a new set of results in standard deviations. He did not state these results in terms of a binomial test,

under which the standard deviations in pay grade 4 would have been barely over 2 (i.e., -2.07) and less than 2 in pay grade 5 (i.e., 01.45).^{38/} On the contrary, he used the hypergeometric test in his tables 34a and 35a. The use of the hypergeometric test in this context is not warranted under the conditions stated by some respected commentators. Under this hypergeometric test, however, the standard deviations for pay grade 4 were 02.09 and -1.87 for pay grade 5. Even if this test result is accepted, there would be no basis whatsoever for inferring discrimination in pay grade 5, and, under our rule as stated in American National Bank, ("... courts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three," 652 F.2d at

^{38/} See note 24.

1192, a finding of statistical significance, much less legal significance, in pay grade 4 would be accepted only with extreme caution, an injunction particular apt in view of the undisputed fact that a disproportionate number of black employees in this pay grade were employed in the cafeteria and service departments from which promotion into clerical jobs at the higher pay levels would be less likely than for those in that pay grade having clerical experience. See Ste. Marie, supra, 650 F.2d at 401.

The expert apparently recognized and even conceded that, for the reasons already given, statistical significance could not be derived from the results of either the binomial or the hypergeometric test under exhibits 34, 35, 34a, 35a or the "buddy" test study which he conducted (in which the standard deviations were less than 2) but

he testified that he was entitled to use a 1.65 standard of standard deviations as a test of statistical significance (i.e., the "one-tailed" test). The propriety of the use of such a test, admittedly favorable to the plaintiffs, depended, even according to plaintiffs' expert, on the right of the expert to assume on the basis of other data accumulated by him that the defendant had been guilty of discrimination and to analyze the results of exhibits 34, 35, 34a and 35a on that basis. As we have said, the facts and data cited by the expert and included in the District Court's Findings simply did not justify such a belief or assumption, and therefore, did not justify the use of this case of a "beef[ed] up" "one-tail" test, to use the District Court's own description of the test. But it is only by the use of such a test that he reached a result of standard

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deviations of -2.69 in pay grade 4 and of -2.01 in pay grade 5, (both of which are below the "safe" figure of -.3). In short, plaintiffs' expert has achieved his opinion of statistical significance by discarding all tests except one which he has admitted in Brown (522 F. Supp. 1218) favors the plaintiffs, and even where he limited himself to that test, he has reached a result which we said in American National Bank was to be accepted with extreme caution. We are of the opinion that the District Court was in clear error in accepting the opinion of plaintiffs' expert on statistical significance when that opinion rested on such skewed analyses and which disregarded the far more reliable tables, (i.e., tables 34 and 35), which demonstrated no basis for a finding of statistical significance, much less legal significance.

Before concluding the class action aspect of this case, we should observe that the defendant offered considerable expert testimony in support of its defense of no discrimination, little of which was noticed or discussed by the District Court in its Findings, and then only in an effort to support its finding of discrimination. The evidence submitted by the defendant was clearly relevant to the defendant's defense that it had never subjected its black employees, either in pay grades 4 and 5, or in any other pay grades, to discriminatory treatment and deserved consideration by the District Court. It consisted largely of various statistical studies made by defendant's expert. One of these studies showed, for instance, that between 1966 and 1978, white employment at the bank dropped from 82.3% to 64.3% while black employment increased from 17.7% to 35.7%

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and that in the period between 1974 and 1978 thirty-five percent of all employees hired by the bank were black, although the black representation in the relevant labor market was but twenty percent.

In another chart, the bank's employees were divided into groups based on type of job corresponding to the Labor Department classifications. The percentage of blacks in each group classification in the Charlotte metropolitan area as shown by the relevant Labor Department statistics was ascertained. Pay grades 3 through 6 under the defendant's employment procedures were classified as a group which "require[d] relatively little training and persons from the general labor market [could] perform at those jobs" in that group. 46.4% of the black employees in 1978 were within the class. This was practically two times the available black employees in the general

labor force in the Charlotte area (i.e., 19.9%). The second grouping covered the employees in pay grades 7 through 13 qualifying within the classification of "labor force clerical employees." In this group were 16.2% of the bank's black employees as contrasted with available blacks meeting the qualifications of such group in the relevant labor market of 10.4%. Again, the percentage of black employees in these pay grades is considerably more than the available qualified blacks in such group in the Charlotte area. The final group embraced pay grades 14 through 16 plus all officers and it was classified in the labor statistics as "non-farm managers and administrators." In this group there was a single black in defendant's labor force but because of the small number involved, this represented 5.6% of those employed in such group as contrasted with 3.75% among the

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available qualified blacks in such classification in the relevant labor area. These comparisons, as set forth in these tables, follow the model set forth in Hazelwood School District v. United States, 433 U.S. 299, under which, the Supreme Court measured disparity by comparing the percentage of black hires to the percentage of blacks available in the relevant labor market. This method of analysis has been declared to be probative of both an employer's actual hiring practices and its recruiting practices. Clark v. Chrysler Corp., 673 F.2d 921, 929 (7th Cir. 1982). In this case, the fact that blacks were more heavily represented at all levels than their representative in the relevant qualified black labor pool would be probative of an absence of discrimination in recruiting, in assignments and in promotions.

Another chart of the defendant treated

the promotion rate of black and white employees employed at all pay grades in the period 1974 to 1978, within the fifteen-month period after they had been hired. This data showed the percentaga of black employees in the entire workforce of the bank in the 1974-78 period, was 33%; during this period black employees received 35% of all the promotions. The defendant's expert calculated from his charts that "[t]he probability of [a] white [employee] being promoted [in the 1974-78 period] was about 18%, whereas the probability of a black being promoted [was] 20%." This calculation was not questioned by the plaintiffs. Moreover, all this information on rate of promotion was verified in the charts developed by plaintiffs' expert. Thus, looking at the years 1974-78, the plaintiffs' statistics established that, except in grade 4, blacks had either less or

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equivalent time than whites in every pay grade from 5 on. Thus, in pay grade 5 in 1974, whites remained in that pay grade 45 months, whereas blacks remained only 31 months. That disparity in favor of blacks continued for the remaining years in the period except for the year 1977 when the two groups were "equal." These results were confirmed by other studies made by the plaintiffs' expert. In this period of 1974-75, the promotion rate for whites overall was 13% and that of blacks 17%; in the 1975-76 period, the promotion rate for whites was 16% and for blacks 19%; and in the 1976-77 period, the promotion rate for whites was 11% and for blacks 15-1/2%. It is plain from this summary of the plaintiffs' expert's statistics that, as the expert admitted, in the critical period 1974-78 the promotion rate for black employees by the defendant overall was

greater than the promotion rate for whites.

The District court, however, states in its Findings that these exhibits of the defendant confirm the finding of discrimination in pay grades 4 and 5, even if they disprove it in all other pay grades. To support this statement it refers to the defendant's exhibit 111 and particularly the record of black promotions in pay grades 4 and 5 for the years 1967-78, which it finds were less percentage-wise than their representation percentage-wise in the defendant's labor force. The reason for this, however, was obvious. Prior to 1966, according to the District Court's Findings, black employees were limited to assignment to "basically cleaning positions and the cafeteria," positions that did not provide the experience to qualify for promotion to clerical work at levels above 4 and 5. This would mean in the early years of this

compilation the heavy concentration of blacks in these labor areas would result in lower rates of promotion for them. This in turn would manifestly skew the figures significantly for a large period of the time concerned by the exhibit in pay grade 4 especially and to a lesser extent in pay grade 5. See Ste. Marie, supra, 650 F.2d 395. But the crucial years in this case are 1974 to 1978 and it is for those years that we must look for discrimination or not at all. That represents the period to which the claim of discrimination in promotion was limited by agreement of the parties and the period within which class discrimination in promotion had to be established by the plaintiffs.^{39/} It is appro-

^{39/} In United Air Lines, Inc. v. Evans, 431 U.S. 533 at 558 (1977), the Supreme Court said:

"A discriminatory act which is not made the basis for a timely charge

priate to look to pre-January 3, 1974 evidence "[o]nly if we conclude that the employees proved certain Title VII violations during the actionable period," Crocker v. Boeing Co., 662 F.2d 975, 990)3d Cir. 1981). The District Court seemingly recognized this, but incorrectly declared that "[d]efendant's exhibit 113 for 1974 through 1978 shows this same disparity by year."⁴⁰ These exhibits to which the Dis-

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is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences."

40/ The language of the District Court was that in this case there was "significant disparity at the 5 percent level of reliability" "with respect to each year [for pay grades 4 and 5, as shown by exhibits 34a and 35a, later discussed] and for the

trict Court refers are, so far as pay grades 4 and 5, no more than a restatement of the very information set forth in plaintiffs' exhibits 34 and 35 and with some significant changes already discussed, in their exhibits 34a and 35a. The plaintiffs' expert conceded that, viewing these exhibits alone, it was not possible to say that there was a statistically significant disparity in the promotions of

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combined years 1974-78." Without regard to whether, we are to accept "the 5 percent level" as reliable, this statement is plainly incorrect, as a cursory review of the very tables quoted by the District Court in its Findings, which used the more favorable hypergeometric test, will demonstrate. For the years 1975 and 1977 the disparity in pay grade 4, as shown on exhibit 34a as quoted by the District Court, is $-.6$ and -1.1 , which under any test stated by plaintiffs' expert was not "statistically significant." Similarly, in pay grade 5 for 1975 and 1976, the standard deviations were $-.2$ and -1.0 , neither of which would be considered by econometricians as sufficient statistically.

blacks out of pay grades 4 and 5 in the period 1974-78. It is only when these figures are "refined" by the application of hypergeometric tests and by the use of a 1.65 standard deviation rule, as contrasted with an "about two or three" test, can disparity be found. We have already indicated why we conclude that such standards (i.e., the hypergeometric test and the 1.65 level for standard deviation disparity) are inappropriate and we need not repeat those reasons here. It is sufficient that, if we consider plaintiffs' own exhibits 34 and 35, or even exhibits 34a and 35a themselves, for the crucial years 1974-78, we are left with no statistical basis for a finding of discrimination in promotion out of pay grades 4 and 5. In fact, plaintiffs' expert witness, during his testimony on recall, answered the question, "[i]n using the directional

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(i.e., the 1.65 level of significance) test, it's (i.e., the result stated in standard deviations] barely significant, isn't it?" with an affirmative. "Yes." Accordingly, even after the use of his hypergeometric and "one-tail" test (which has recognized favors the plaintiffs in this case) can he find even "barely significant" statistical basis for an inference of discrimination in promotion out of pay grades 4 and 5 on these exhibits of the defendant. This is manifestly no comfort to the plaintiffs in the findings in the defendant's exhibits.

It follows that a finding of either a prima facie case or of a pattern of class discrimination in promotions out of pay grades 4 and 5 or a finding of fact of such a pattern is not supported by any substantial evidence either of live testimony or evidence in plaintiffs' presentation or in

defendant's statistical tables and any conclusion of class discrimination in those pay grades is clearly erroneous and without any substantial support in the record. We accordingly reverse the District Court's Findings and Conclusions of class discrimination in promotions out of pay grades 4 and 5 and direct the entry of a dismissal of such claim.

We now turn to the two individual cases of discrimination. The first of these is the claim of the intervenor-plaintiff Russell. The District Court found that the defendant had discriminated against her (1) by denying her promotion to a supervisory position in 1974 despite her qualifications and the existence of a vacancy and (2) by harassing and intimidating her and (3) finally in discharging her in retaliation for her filing an EEOC charge against the defendant.

The claim of a denial of a promotion did not arise out of any application or request for a promotion by Russell. The defendant, through its supervisor, approached Russell and inquired whether, to use Russell's own words, she would be willing to return to "low speed in order that she could train new employees," the supervisor explaining, according to her, that, if she agreed, she "would be promoted in grade, and she would have supervisory status and responsibilities." According to the District Court's findings, she accepted but was "denied supervisory status and a pay grade increase," though, after complaining, she "later received a pay grade increase but has continuously been denied supervisory status."

Actually, Russell's own testimony was somewhat different from this summarization by the District Court. Her reply to the

job offer made her by her supervisor was "that [she] would accept the job on the basis that we agreed to [dependent on] what [her] job title would be, what [her] job duties would be, and if the agreement didn't work out that [she] would return to [her] position as checker." Pressed by her attorney as to whether she had been "told anything about supervisory responsibilities," she added that she was told she "would be offered a job as a utility clerk, which at that time meant supervisor, and that [she] would have supervisory responsibilities over the new girls that were coming into the first-run section, and that [she] would aid them in training with any problems that they would have; but [she] would also keep the work kept up if it should get behind." Russell accepted the offer and transferred to the new job.

After she had transferrred, Russell testified that she "didn't see my job title or grade 6 right away." (Italics added.) She went to her supervisor's office to complain "about not receiving [her] job title and [her] grade when [she] was handed [her] raise slip with [her] job title of utility clerk and [her] Grade 6 and the amount of [her] raise." At this point she said, "I was all right then." In short, then, by her own testimony, Russell had gotten precisely what she had been promised. She had received the exact title, pay grade and pay raise she had been promised. She was satisfied. So far as the record shows, she never missed one pay date at her increased pay status; her pay at pay grade 6 began as of the time she began work at her new position. She had at the time no complaints.

Sometime later, however, she observed two other employees in her department who attended what she understood was a supervisors' meeting. She testified she was not invited or allowed to attend the meeting.^{41/} She contended she was doing the same type of work as these two employees and that the failure to invite or allow her to attend the meeting established that she was not being treated like white employees in similar status to her. She, however, admitted that both of these other employees, Ina Mauney and Joanne Moore, had been employed longer at the bank than she - in fact, she testified that Mauney in particular had worked "a lot longer" at the bank than she, and that both Mauney and Moore had been promoted to pay grade 7 with job

^{41/} The District Court speaks of "meetings." The complaint referred to a single meeting.

classification of "utility clerks A" some months before Russell had recieved her promotion to pay grade 6. In any event, Russell by her own testimony, was plainly not comparable to Mauney or Moore either in pay grade or in title status and had never been. She never claimed that she was promised job status as "utility Clerk A" or a pay grade of 7 comparable to the title and pay grade of Mauney and Moore. She had gotten what she herself said had been promised, i.e., the title of "utility clerk" at pay grade 6. Despite this, the District court concludes that Russell had been discriminated against by not being given the classification of "utility clerk A" at pay grade 7 because such a classification and pay grade were "more relevant to the job duties Russell was assigned." This is the theory on which the District Court found that Russell had been discriminator-

ily denied a promotion. There is no basis or justification for such a finding in this record, and the finding of discrimination in this respect is reversed.

The second ground for finding discrimination in favor of Russell, as stated by the District Court, arose out of her discharge in January, 1975. Prior to 1974 Russell had been a valued employee and had received satisfactory evaluations annually for several years. The defendant had recognized this service and had rapidly advanced Russell to pay grade 6, with appropriate pay increases. But in 1974 Russell's conduct as an employee deteriorated seriously. This is not just the defendant's testimony; Russell herself candidly testified to such fact. When asked, "[y]ou did have an attendance problem in your last year with the bank?" she responded, "Yes." She identified

various forms titled "Explanation by Employee of Absences and Attendance Reports," signed and acknowledged by her, covering excessive absences or tardiness in the year 1974 and continuing into the month of January, 1975. Without attempting to deny her absenteeism she would excuse her absenteeism, testifying that "[p]art of the time I was ill. Part of the time my children were ill, and I had, I was on medication that I had gotten from the doctor because I was under a lot of stress." She admitted being counseled by her supervisor about her "absenteeism and tardiness" a number of times throughout 1974. She was given at least one and perhaps two reprimands for absenteeism and tardiness, low work evaluations and finally was placed on probation in that year. She had other difficulties beyond that of absenteeism as an employee. These two were discussed with

her and she was counseled about them. She, for instance, did not dispute that she did not get along with her supervisor or with another black employee in the department.

After she received her first reprimand and had been placed on probation for absenteeism, she filed in mid-July, 1974, her first charge of discrimination against the defendant. In this charge, she said "[t]he above Company demoted me because of my race, ^{42/} Negro, refused to promote and train Negro employees because of their

42/ There was no evidence that she was ever demoted. Russell, however, apparently based this claim upon her contention that she was denied the same prerogatives of attending a meeting as had Mauney and Moore. This denied her, as she asserts, supervisory status. However, the only supervisory status she was ever promised by her own testimony "to train new employees" and that, by her own testimony, she did. Actually, her charge was filed in retaliation of being placed on probation for absenteeism.

race,^{43/} and discriminated against me with respect to terms and conditions of Employment (Job Assignment), because of my Race (Negro)." Even after she had filed this claim of discrimination and after she had been placed on probation for her admitted record of excessive absenteeism, Russell's absenteeism continued without any noticeable improvement. Finally, her immediate supervisor Cain, in November told her he was recommending her termination. Cain submitted his recommendation to this supervisor, Walker, whose title was assistant vice-president. The latter told Cain he thought Russell should be "assigned to

^{43/} This apparently refers to an inquiry by Russell about the opportunity for experience in the use of a particular machine. The supervisor explained, according to Russell, that the existing machine was being replaced by a more sophisticated machine and he was not providing training on the old machine but would provide it when the new machine was received.

other duties in another department." He made this decision "[in] the hope that Ms. Russell, by virtue of a new assignment and new environment, might correct the problems that we had pointed out to her in previous months."

On January 20, 1975, Walker talked to Russell. He reviewed with her her unsatisfactory employment record during 1974 and, then, by his account, "offered her an opportunity to transfer to the Adjustments Department," explaining to her "that we felt that a change in supervision and work atmosphere might help the situation, so we might preserve the training and experience that she had, which is valuable to us in this operation." Russell responded, as Walker testified, that "she liked to work in the Check Operations better than working in Adjustments." She added that "[a]lthough she was familiar with it, she had

not had much opportunity to work in that area ... and asked if she might be allowed to return to the Check Collection Department at some point in time." Walker said his response was that "if her attendance improved, her tardiness record and overall work attitude in her new assignment, if improvement occurred, she [might] be considered for reassignment in Check Operations at some point in time." Walker saw Russell again on January 22, and told her that she would be transferred to Adjustment on January 27. According to Walker, Russell replied, "that her attorney had advised her and that she was refusing the transfer ... and that she had also amended her charge against the bank to include retaliation." Finally, on January 24, Walker, with Cain present, saw Russell for the third time and "again offered her the opportunity to transfer to the Adjust-

ments Department and informed her that if she refused the transfer that we would have to alternative but to terminate her employment with the bank immediately." She refused the transfer and her termination was then processed.

This account is not substantially different from that of Russell, except that she disputed that she had said that she was refusing the transfer on advice of her lawyer. In her sworn charge as filed with the EEOC, however, Russell said that she was "refused permission to transfer after [she had previously requested a transfer to that division, i.e., Adjustments] refusing same." At the trial several years later, she testified she "refused to go into that [Adjustments] department because [she] has already volunteered to work in that department, and I was told that I did not have enough experience and there was

no one to train me; and I refused it because I felt then that I didn't have any job knowledge." This testimony, that she had earlier volunteered to work in Adjustments but had been refused because of a lack of experience, is contradicted, however, by other testimony given by Russell herself at trial. She testified at trial that when she had volunteered to go to Adjustments, her supervisor "acted as though he didn't hear me," not that her supervisor told her that she "did not have enough experience ... [or] any job knowledge." She, in turn, sought to explain away the language in her EEOC charge that she had previously requested a transfer to that division some two months before her discharge in January, 1975 by repudiating the language in the charge, saying that she was "under pressure" when she gave the statement and denied she had ever "ask[ed]

for a transfer" to Adjustments, only that she had "volunteered" to go to Adjustments. The statement, however, was drafted in the EEOC office in conjunction with an EEO employee without any employee of the defendant being present.

The District Court finds that her discharge in January, 1975, was "in retaliation" of Russell's action in filing an EEOC charge in July, 1974. In support of this conclusion, the District Court found that, after the filing of the EEOC charge, Russell was given "unfair adverse performance evaluations, [and] threatened with termination of her employment," although such unfavorable evaluations, reprimands and threats of termination "were not based on any deficiencies in Russell's performance" and "can only be explained on the basis of Russell's race." As we have already indicated, her work performance

before her probation, by her own explicit admission, was deficient; the findings of the District Court to the contrary simply have no support in the record. It cannot, therefore, be said in the light of the record and Russell's own admissions that the reprimands, the counseling and the evaluations of Russell's job performance were "unfair." Equally without any real basis in the record is the statement that the reprimands, the probations and the evaluations only occurred after Ruseell had filed her complaint with the EEOC. When asked, "[w]hat happened, Ms. Russell, after you filed your charge with the EEOC?" Ms. Russell replied, "[W]ell, I started, I got a low progress report, and I was put on 60 days probation, no, that was before I filed. I was just being harassed." (Emphasis added) She offered no explanation of how she was harassed.

But even though she had poor job performance Russell claims she should not have been placed on probation or given the option of transferring or being fired because other employees, with equally bad absenteeism and tardiness records had not been so treated. This explanation was accepted without question by the District Court. Ms. Russell identified three employees who, she said, had similar or worse absentee records than she and who were treated more leniently. These three were Joyce Norwood, Joyce Gibbs and Donna Stokes; of the three, Norwood was black and Gibbs and Stokes were white. Norwood and Stokes were counseled about their absenteeism about the same time as Russell and both, according to the defendant's undisputed testimony, responded by improving their attendance record. Norwood had had, according to her head supervisor, only two

absences after counseling and had since been promoted twice. Since Norwood is black as is Russell, the difference in treatment between the two could not be racially motivated, and would appear to have been based on Norwood's response to her counseling. Stokes, like Norwood, was retained after she corrected, following counseling, her attendance. But Gibbs, a white, who did not respond, was terminated. Russell contends, however, that Gibbs' absenteeism had been more protracted than hers. The defendant, also, identified two other employees in the same department as Russell, both of whom were white and both of whom were fired at about the same time as Russell for excessive absenteeism without any offer of a transfer. Again, the plaintiff-intervenor counters that the absenteeism of these two whites was more exaggerated than Russell's. The

fact of the matter, though, is that the defendant terminated both white and black employees for excessive absenteeism and that Russell was guilty of such absenteeism is unquestionably established.

The District Court seems to accept that, under the Burdine rule^{44/} the defendant rebutted the intervenor-plaintiff's prima facie case by articulating a legitimate reason either for her discharge or her transfer because of her absenteeism and tardiness, as well as because of the friction between her and her employer and fellow employees in her existing department. The District Court, however, found that the defendant's reason for discharging Russell, as claimed by it, was pretextual. What the District Court purported to ground

44/ Texas Department of Community Affairs v. Burdine, 430 U.S. 248 (1981).

its finding on pretext in discharging Russell for absenteeism was that the offer to Russell of a transfer without loss of pay grade or salary level to another department was pretextual. It bases this conclusion on the alleged failure of the defendant to assure Russell that she would be given training for the new job and that she was not told specifically what the new job would be. The defendant's witness testified that Russell made no inquiries along this line but abruptly refused the transfer. It is admitted that she went straight from the bank to the EEOC office and filed a charge in which she justified her refusal on the ground that the defendant had earlier refused her request to transfer her to Adjustment.^{45/} She made

^{45/} Russell had earlier filed three charges against the defendant with the

no such claim as that stated by the District Court in her charge. It is also significant that, when she requested a transfer to that department two months earlier, there had been no discussion of what her job would be, presumably because Russell, who had worked at the bank for several years, knew what the work was in the Adjustment Department, and because she knew that it was the policy of the bank to provide any training an employee might need where there was a transfer of jobs by employees.

Nor is there any reason to doubt the good faith of the bank in the offer of a

45/ continued

EEOC. The first was in July, 1974, after she was placed on probation, the second was in October, 1974, when she was told her supervisor was recommending her termination, the third on January 23, 1975 and the final one on January 24, 1975, after she had been terminated.

transfer. Walker, the top official over Russell, indicated quite clearly to Russell he wanted to try to enable her to overcome her difficulties and to resume her career as a valuable employee of the bank. There was nothing in his conduct in the final interview, as testified to by Russell, herself, which would indicate abruptness, indifference, or hostility. On the contrary, Walker's attitude was, if we take his account (and Russell does not dispute it), friendly and conciliatory. He refused earlier to approve a recommendation to fire Russell and in selecting a department to assign her to on transfer, he chose the very one which Russell had earlier filed a complaint because she had not been transferred to it. We are unable to find any substantial evidence in the record to support a finding that the alternative offer of a transfer or termination was

racially motivated^{46/} or motivated by an intention to retaliate, or that the defendant's action was pretextual. This is a case of an employee, whose work performance, under her own testimony, was unsatisfactory and the mere fact that she had filed an EEOC charge could not immunize her from legitimate disciplining for unsatisfactory performance. Section 704(a) was never intended to be a shield for the admittedly delinquent employee. See Dickerson v. Metropolitan Dade County, 659 F.2d 574, 580-81 (5th Cir. 1981); Hochstadt v. Worcester Foundation, Etc., 545 F.2d 222

46/ There is no evidence that, in its dealings with employees, the defendant or its supervisors had ever evidenced any racial bias. There is no testimony of racial slurs by supervisors, as in many cases. There was no harassment of minority employees because of their race. If anything, the minority was, as we have seen, actually favored over-all in promotions.

(1st Cir. 1976). To make out a case of retaliatory discharge, it was necessary under some of the decisions for Russell to show that "but for" her EEOC charge she would not have been discharged. Jackson v. City of Killeen, 654 F.2d 1181, 1186 (5th Cir. 1981)("Plaintiff failed to show that the defendant's reasons for her discharge were pretextual, i.e., that her race was a 'but for' cause or determining factor for her discharge"); Mack v. Cape Elizabeth School Bd., 553 F.2d 720, 722 (1st Cir. 1977) ("... that but for them she would have been re-employed"); Staniewicz v. Beecham, Inc., 687 F.2d 526, 528 (1st Cir. 1982); cf., Lovelace v. Sherwin Williams Co., 681 F.2d 230 (4th Cir. 1982), and Brodin, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspec-

tive, 82 Col. L. Rev. 292 (1982).^{47/} We find in all this no evidence of pretext in order to conceal a retaliatory intent and beyond question there was no racial bias involved. We accordingly reverse any finding of discrimination in Russell's treatment in this regard.

The second claim of the other intervenor-plaintiff Cooper presented a less complicated set of facts. She has been initially employed at pay grade 3 but she

47/ The author concludes:

"Although the Supreme court has said little regarding mixed-motive causation in individual Title VII cases, its teaching in Title VII class-action cases and elsewhere seems to point toward the adoption of a test that permits a defendant who is found to have been motivated by an unlawful consideration to escape liability if he can establish that he would have arrived at the same decision even absent the unlawful consideration." [Page 293]

had been given what was, except for a delay occasioned by a maternity leave, roughly annual promotions until her promotion on August 12, 1974, when she had reached the level of pay grade 6. At that time her supervisor inquired of her whether she would like to move to the position of settlement clerk with an increase in pay grade to 7 and with a salary increase. She accepted the offer and on August 12, began her duties as a settlement clerk at pay grade 7. Later, when she discussed her job evaluation report with her supervisor, the latter told her, according to her account of the conversation, that she "was at the maximum for Grade 7, that [she] would have to get a promotion in order to get a raise" and that "he would let [her] know if any job came up that he felt [she] could do." In the latter part of June 1975, she learned that John Morgan, a white, had been

promoted from pay grade 6 to pay grade 8 and given a supervisory position. She complained to her supervisor that she had not been given the promotion and proceeded instantly to file her complaint of racial discrimination on July 8, 1975, with the EEOC.

John Morgan, who had received the promotion, had been employed in early 1974 by the defendant at pay grade 6 and had been assigned to the department where Ms. Cooper was working. On August 12, 1974, which interestingly was the same date on which Ms. Cooper had been promoted out of pay grade 6, Morgan was assigned as a reader-sorter operator in the department. This operation was connected with the computer division in the department separate from and not observable from other parts of the department, including where Cooper worked. On February 10, 1975, Morgan was

promoted to pay grade 8. There is dispute about his title as a result of the promotion. Morgan's superior testified that his promotion was to the position of reader-sorter supervisor; the employment record describes his new job as utility supervisor. The defendant contended it was a clerical mistake to list Morgan as a utility supervisor. It is not necessary, however, to resolve whether the title given or the record was in error. Whatever his formal title, it is beyond dispute under all the evidence that his primary duties from the first were connected for all practical purposes exclusively with the reader-sorter operation. Ms. Cooper's testimony corroborates indirectly this conclusion. From February until June, 1975, Ms. Cooper never saw Morgan in the department outside of the computer room and he exercised no supervisory duties in any area except in the

computer room where the reader-sorter operation was located. In fact, Ms. Cooper testified she never came into contact with Morgan and never knew that Morgan had been promoted to a supervisory position even though they were working in the same department on the exact same shift, until, at a meeting of employees in late June, some five months after Morgan had been promoted, the department head told all the employees Morgan was a supervisor. Assuredly, if Morgan had been promoted in February to utility supervisor with authority over Cooper and others in the department, Cooper would have come in contact with him and would have known that he was her supervisor. All of this confirms that Morgan's primary responsibility, as the department head testified, was the reader-sorter operation and only that operation, though the department head indicated that,

as time went on and Morgan became more proficient, he expected to extend Morgan's duties.

The District Court included in its findings a note to the effect that "[i]n view of the testimony regarding Morgan's duties, the demeanor of the witnesses and the record evidence, the court refused to accept defendant's assertions that J. Morgan was a reader-sorter supervisor. Even if J. Morgan were reader-sorter supervisor, Cooper was more qualified than J. Morgan according to defendant's records to fill the position and was more experienced in the Bank," and had higher performance evaluations. This finding was taken verbatim from plaintiffs' proposed findings, in which it appears, as it does in the District Court's findings, as note 9. This finding, however, though somewhat ambiguous, seems to accept that, under the facts,

the issue revolves about the respective qualifications of Morgan and Cooper for reader-sorter supervisor. And the testimony of the parties was specifically directed to that issue.

Under these circumstances, we begin, as did the District Court, with assuming that Ms. Cooper had made out a prima facie case and that the defendant had responded with a legitimate, non-discriminatory reason for selecting Morgan because of his greater understanding and ability in operating the reader-sorter machine. The issue, under Burdine, then becomes whether Ms. Cooper has established by the preponderance of the evidence that such reason was pretextual and not asserted in good faith. We note at the outset that there is no showing anywhere that the defendant or any of its supervisors had demonstrated any racial prejudice or taken any discrimi-

natory action against Cooper because of her race; nor is there any evidence of racial slurs or discourtesies directed at Ms. Cooper or any other black employees by the defendant or any of its managers or supervisors. On the contrary, the conduct of the defendant towards Cooper in particular had been uniformly considerate and helpful. Her record of steady promotions attested to that. In fact, her last promotion resulted not from any request by her for a promotion but was initiated wholly by Cooper's own supervisor. Nor was there any evidence of any practice of racial discrimination in promotions at Cooper's pay grade. The District Court found to that effect and the plaintiffs have not contested that finding. There simply is not any evidence in this case of any racial motivation in the defendant's act of preferring Morgan over Cooper for the

particular job available on February 10.

There can be little argument that, if the primary responsibility of the job to which Morgan was promoted was the reader-sorter operation, Morgan's qualifications were superior to those of Cooper. It is not of moment whether Cooper had been longer employed over-all than Morgan. The question was: Was Morgan or Cooper better qualified to supervise the reader-sorter operation? The answer to that question turned on the experience and competency of the two parties in the operation of the reader-sorter machine, which unquestionably was an operation requiring considerable experience and skill. One could not well supervise such a complicated operation if one did not possess competency in the operation of such machine, particularly if the employee had not acquired the skill

herself to operate the machine. Morgan had been an operator of the machine for some six months. He had shown proficiency as such an operator. He was able to operate the machine alone. He was in a position to supervise and to relieve the operators. He knew how to make minor repairs on the machine. Cooper had worked at most two and a half months in the reader-sorter room. She never had been able to operate the machine alone. She admitted she didn't know how to put the data in the machine and that such procedure was necessary in operating the machine. Her ability to work on the machine was confined to cleaning. It is impossible to understand how she could have relieved an operator or could have aided an operator who had trouble with placing data in the machine or could have supervised the employees working in the reader-sorter

operations. Moreover, she did not like working in the reader-sorter room and had been transferred out of that operation at her own request.

The employer has the right to fix the qualifications that are "necessary or preferred" in selecting the employee for promotion, and, in order to make out a prima facie case, a plaintiff must establish that she meets these qualifications. This is the purport of the decision in Waters v. Furnco Construction Corp., 688 F.2d 39 (7th Cir. 1982), on remand 438 U.S. 567 (1978), where the employer had established as qualification for hiring as bricklayers only those known by the foreman to be experienced and capable from former employment. Under the earlier decision of the Supreme court in that case, that test was upheld though it denied experienced minority bricklayers who had not previously

been employed by the defendant consideration for employment. This was, also, the holding in Aikens v. U.S. Postal Service, Bd. of Governors, 665 F.2d 1057, 1059 (D.C. Cir. 1981), cert. granted, 102 S.Ct. 48/ 1707, wherein the Court said:

"A plaintiff who demonstrates that he possesses the absolute minimum qualifications for a job [in promotion], therefore, does not necessarily make out a prima facie case; if the employer has indicated that certain additional qualifications are necessary or preferred, the plaintiff must demonstrate that he has those qualifications are necessary or preferred, the plaintiff must demonstrate that he has those qualifications as well."

Later, the Court added (Id., at 1060):

48/ Certiorari was granted on the petition of the employer, the United States Postal Service in Aikens. The petition assailed the holding of the Court of Appeals that a minority employee, claiming discrimination in a promotion, need not establish that he was either as well or better qualified than the employee selected for the promotion in order to make out a prima facie case. See Note, Relative Qualifications and the Prima Facie Case in Title VII Litigation, 82 Col.

"At the prima facie stage . . . the plaintiff may be required to go beyond a showing of minimum qualifications to demonstrate that he possesses whatever qualifications or background experiences the employer has indicated are important." 49/

The defendant in this case clearly "indicated" that a qualification for the promotion in question was experience and competency in operating a reader-sorter machine, and the District Court recognized this. As we have already observed,

48/ continued

L. Rev. 553, 563 (1982). We assume that the employee in this case had made out a prima facie case but we decide this case upon the failure of the claimant to meet the test established in Aikens for proving that the employer's reason for failing to promote the claimant was pretextual. In that latter case, the burden is on the claimant to show her "superiority" or, at least, equality, in competency over the one selected.

49/ Certiorari was granted on the petition of the Solicitor General appearing on behalf of the defendant contending that the rule enunciated by the Court of Appeals on proof of a prima facie case, as required of the plaintiff, was too lenient.

by her own admission, Cooper could not operate a reader-sorter machine. She couldn't load the machine; neither had she ever operated the machine by herself. Absent that qualification, Cooper's claim of a prima facie case is open to serious doubt. But, even if we agree that she had made out a prima facie case, it is manifest, as the District Court found, that the defendant had "articulated" a legitimate reason for selecting Morgan over Cooper for the vacancy. In order to overcome the defendant's articulation of a legitimate reason for giving the vacancy to Morgan because of his greater experience and competency in the reader-sorter operations, Cooper had, according to Aikens, "to show [her] superiority" over Morgan in the reader-sorter operations "in order to prove discrimination," in her non-selection for the promotion, [665 F.2d at 1060] and

thereby to establish that the defendant's reason was pretextual. Cooper failed entirely to meet this burden and the finding of the District Court to the contrary is without substantial support in the record and was clearly erroneous.

After Ms. Cooper learned of Morgan's promotion in late June, she determined to quit or, as she expressed it in her charge as filed with the EEOC, "[a]s a result [of] the defendant's denial of consideration of her for a new position], I was forced to terminate." The District Court held that Cooper quit "only because of the Bank's preferred treatment of Morgan and the embarrassment and unfavorable working environment to which Cooper was thereafter subjected," and that, "[u]nder the circumstances, the termination of her employment constituted a constructive discharge in violation of 403(a) of Title

VII" This claim would appear mooted by the fact that Cooper failed to show that the defendant's ground for promoting Morgan was pretextual. But, even if the claim were not pretextual and the issue of constructive discharge was proper, there was no basis in the record for a finding of constructive discharge. To establish "constructive discharge" under Title VII, "the employee must [have been] subjected to employment practices which are discriminatory and which make the working conditions intolerable, thus forcing the employee to quit. Further the employer's actions must be intended by the employer as an effort to force the employee to quit." Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982). See, also, J. P. Stevens & Co., Inc. v. N.L.R.B., 461 F.2d 490, 494 (4th Cir. 1972); Grigsby v. North Miss. Medical center, Inc., 586 F.2d

457, 461 (5th Cir. 1978); Nolan v. Cleland, 482 F. Supp. 668, 672 (N.D. Cal. 1979). There is absolutely no evidence that the defendant sought by its action "to force [Cooper] to quit." The evidence is quite clearly to the contrary. Cooper's supervisor sought to persuade her not to quit. Moreover, her only complaint of unfair treatment, even under her own testimony, was the failure to be promoted. Yet, "[t]he cases applying the doctrine of constructive discharge have held that failure to promote, in and of itself is not sufficient to result in a constructive discharge." Irving v. Dubuque Packing Co., supra, 689 F.2d at 172. Cooper claims that she was embarrassed by not being promoted. That occurs any time an employee is not promoted. Moreover, in this case, the embarrassment, if any, was short-lived. Cooper only learned of the

promotion when she was working on the night shift and she immediately quit when she got off work that night. There was no harassment "to which Cooper was thereafter subjected." The only basis for a claim of "constructive discharge" is failure to promote and that simply is insufficient, particularly under the facts of this case, to establish a "constructive discharge."

We are confirmed in this opinion in this case by the response of the defendant when Cooper expressed her intention to quit. When told of her intentions, her supervisors, as we already pointed out, counseled her against quitting. Despite their counsel, she went to the Personnel Office and asked for a form of resignation. The employee in the Personnel Office attempted to dissuade Cooper from quitting. Cooper testified that the Personnel employee finally gave her the resignation

form which Cooper signed. At this point, the testimony diverges. Cooper testified that the Personnel employee told her that she would not turn in the resignation until 12 o'clock that day and that, if Cooper wanted to withdraw it, to call her before 12 o'clock. Wilson, the Personnel officer involved, denied such understanding. Cooper claimed she called Wilson about 11:30 A.M. but that Wilson told her she had inadvertently shown the resignation to her superior and the latter had processed it. Wilson denied that such conversation took place. Whether the facts were as Cooper gave them or as Wilson testified, there is no evidence that there was any racial motivation which prompted the mix-up, if there actually was a mix-up, and nothing to support a finding of discriminatory purpose.

The claim of Cooper is remanded to the

District Court with directions to dismiss.

There is another appeal connected with the class claim and consolidated with it for disposition by us, which remains for decision. It arose initially out of a motion by the individuals Phyllis Baxter, Brenda Gilliam, Glenda Knott, Alfred Harrison, and Sherri McCorkle to be permitted to intervene in the class action. These petitioners for intervention asserted in the proposed complaint, as attached to their petition to intervene, injury as a result of discrimination in promotions because of their race and color in violation of § 1981, ^{50/} 42 U.S.C. Except for the claim of Alfred Harrison, these claims related to denials of promotions out of pay grades above pay grade 5 occurring after January 3, 1974.

^{50/} It is plain they did not assert claims under Title VII because their claims under that statute would have been untimely.

All of the petitioners, however, were clearly within the class certified by order of the District Court at the beginning of the class action on March 22, 1977, i.e.:

"All black persons who have been employed by the defendant at its Charlotte Branch Office at any time since January 3, 1974 [6 months prior to the first charge filed by the intervenors with EEOC], who have been discriminated against in promotion, wages, job assignments and terms and conditions of employment because of their race."

They received notice of that certification along with plainly stated advice that, if they desired, they could exclude themselves from the class by notifying the Clerk of the District Court, but that the Court would "include [them] in the class in this action unless [they] request[ed] to be excluded from the class in writing." The consequences of not opting out for a class member were distinctly spelt out in the notice: ". . . the judgment in this

case, whether favorable or unfavorable to the plaintiff and the plaintiff-interveners, will include all members of the class; all class members will be bound by the judgment or other determination of this action" The notice, also, stated the consequences of opting out: ". . . [they] would not be bound by any judgment or other determination in this action and you will not be able to depend on this action to toll any statutes of limitations on any individual claims that [they might] have against the defendant" The petitioners, though thus noticed, did not opt out but instead they cooperated with the class action by testifying at trial. On October 30, 1980, the District Court filed its "Memorandum of Decision" in the class action. It was not until March 23, 1981, -almost five months after the District Court had filed its Memorandum

of Decision and four years after the class action was begun- that these petitioners appeared by the same counsel as had represented the plaintiffs in the class action, filed their motion for leave to intervene and to file complaint-in-intervention.

The District Court denied the motion to intervene, holding that petitioners claiming discrimination above pay grade 5, "are not entitled under the ruling of the court to be treated as members of the class which has gained rights in this litigation" and that petitioners having claims of discrimination below pay grade 5 "are in the class as to which relief has been ordered by the judgment in this case and their rights will be dealt with in Stage II proceedings" of this action. The denial was made without prejudice to any underlying rights the intervenors may have, and included a dictum to the effect that

the Court saw "no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week." There was no appeal from this order.

The petitioners thereafter on May 13, 1981, filed their action in the District Court, setting forth their individual claims of discrimination in promotions because of their race and color occurring after January 3, 1974, in violation of § 1981. The defendant moved to dismiss the action as barred under principles of res judicata by the adverse decision in the class action. The District Court entered an order denying the motion to dismiss without a statement of reasons but properly certified the issues raised by the motion to dismiss for interlocutory appeal

under § 1292, 28 U.S.C. Interlocutory appeal was granted to us and the appeal was consolidated for appeal purposes with the main appeal in this proceeding.

The rule for determining when a judicial determination in a properly certified class action will bind a class member, not opting out after notice, in asserting thereafter an individual claim within the range of charges determined in the class suit was settled by us in Dalton v. Employment Sec. Com'n. of N.C., 671 F.2d 835 (4th Cir. 1982), cert. denied, 51 U.S.L.W. 3257; Woodson v. Fulton, 614 F.2d 940 (4th Cir. 1980); Dorsey v. Smith, 91 F.R.D. 261 (D. Md. 1981); see also, Kemp v. Birmingham News Co., 608 F.2d 1049 (5th Cir. 1979). The class member in such a case seeking relief individually on charges of discrimination within the charges determined in the class

action is precluded by res judicata from maintaining subsequently an individual action claiming discrimination in a particular ruled on in the class action. The only exceptions to this rule are grounded on due process, which requires that there be proper certification of class, adequate notice to class members, and adequate representation of absent class members. Thus, if there were not class certification, res judicata does not apply. Simer v. Rios, 661 F.2d 655 (7th Cir. 1981); see 48 ALR Fed. § 3, 679. Similarly, if the individual class member or his sub-class were not adequately represented, due process is violated and res judicata will not attach. Lewis v. Phillip Morris, Inc., 419 F. Supp. 345 (E.D. Va.), rev'd. on other grounds, 577 F.2d 1135 (1978); Grigsby v. North Miss. Medical Center, Inc., 586 F.2d 457 (5th Cir. 1978);

Haas v. Howard, 579 F.2d 654 (1st Cir. 1978). None of those circumstances is present here. The class was properly certified; proper notice was given class members; and the class was completely and adequately represented. The class certified and the charges litigated in the class action included the claims and charges asserted by the plaintiffs in these subsequent individual suits. They (except Harrison), are, therefore precluded by the determination of the District Court in the class action suit that there was no practice of discrimination in promotion out of pay grades above pay grade 5 in the years 1974 forward. The plaintiff Harrison, however, is precluded by our determination on this appeal that there was no practice of discrimination in pay grade 5 and below.

The plaintiffs seek to escape the bar

created by the determination in the class action suit by arguing that they were prevented by the District Court in proving their individual claims in the class action trial. This argument would disregard the fact that the trial was bifurcated by agreement of the parties. Accordingly, the first issue to be resolved in this case was that of liability for discrimination by the defendant. If liability were not found at this stage, the second stage which would relate to establishing the individual claims of class members, such as these plaintiffs, would be mooted. However, specific evidence of individual acts of discrimination in promotion was relevant, but, under the practice in a bifurcated trial, it was not admitted to establish the class members' right to relief, but to provide support for the prima facie class

claim of liability. ^{51/} This was made clear in the ruling of the District Court that any right of a class member to participate in a favorable judgment was a matter to be resolved only after the issue of liability had been resolved. Sledge v. J. P. Stevens & Co., Inc., 585 F.2d 625, 637 (4th Cir. 1978), cert. denied, 440 U.S. 981; Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 828 (5th Cir. 1982). The plaintiffs' counsel, who were also counsel in the class action suit, plainly recognized and acquiesced in this decision. See Newman v. Prior, 518 F.2d 97, 100-01 (4th Cir. 1975).

^{51/} See Valentino v. United States Postal Service, 674 F.2d at 68: "Even when the statistical proof is so compelling that it might, in itself, satisfy the plaintiff's initial burden, the prima facie case is bolstered and the court's evaluation is aided by testimony recounting personal experiences of class members."

The plaintiffs, also, press the point that the District Court in its order denying intervention, stated, by way of dictum, that it saw no reason why the plaintiffs could not file their individual suit under § 1981 or why the EEOC could not validate a suit under Title VII by issuing now a right to sue letter. This comment was made by the District Court four and a half months after it had decided the class action suit and about four years after the plaintiffs had been noticed of their obligation to opt out if they wished to preserve their right to maintain an individual suit. The opinion expressed was plain dictum and could not constitute a basis for contending that the plaintiffs had been misled or prejudiced in any way.

Finally, the plaintiffs have cited to us Dickerson v. United States Steel Corp.,

582 F.2d 827, 831-32 (3d Cir. 1978). There is dictum in that case which it could be argued, suggests that the proof is "different between class action claims and individual claims of discrimination" and that there is not such commonality of law or fact between the two claims, that of the class action and that of the individual's claim of discrimination, as to support res judicata. However, that is not the manner in which the ruling in Dickerson has been interpreted by the Third Circuit. In an en banc opinion in Crocker v. Boeing Co., 662 F.2d at 997, that Circuit dismissed under res judicata two individual claims "because they were not named plaintiffs but rather were class-member witnesses whose classwide claims had been unsuccessful" in the earlier class suit and it cited Dickerson in support.

It is to be remembered that a judgment in a class action suit is not a one-way street for the benefit solely of the plaintiffs, as the plaintiffs would argue; its determination is available as either a weapon for the plaintiffs or a shield for the defendant, dependent on its result. Moreover, one of the reasons for Rule 23 is to relieve the burden on the courts of successive trials of the same issues. This purpose would be thwarted if a properly filed and prosecuted class action did not result in a determination binding on all members of the class as well as on the defendant.

We accordingly remand the individual cases of the five plaintiffs to the District Court with directions to dismiss.

In view of our determinations, the claim of plaintiffs' counsel for attorneys'

fees in No. 81-1536 is mooted and the grant of such is vacated.

The judgments of the District Court in both cases are

REVERSED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1536

=====

Equal Employment Opportunity
Commission; Sylvia Cooper;
Constance Russell; Helen Moore
and Elmore Hannah, Jr.,

Appellees

-versus-

Federal Reserve Bank of Richmond

Appellant.

No. 82-1259

Phyllis Baxter; Brenda Gilliam;
Glenda Knotts; Alfred Harrison
and Sherri McCorkley,

Appellees,

-versus-

Federal Reserve Bank of Richmond,

Appellant.

=====

O R D E R

Upon consideration of the petitions
for rehearing,

Now, therefore, with the concurrence
and approval of Judge Widener and Judge
Hall,

IT IS ORDERED AND ADJUDGED, That the
petitions for rehearing are denied.

United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1536

=====

Equal Employment Opportunity
Commission; Sylvia Cooper;
Constance Russell; Helen Moore
and Elmore Hannah, Jr.,

Appellees

-versus-

Federal Reserve Bank of Richmond

Appellant.

No. 82-1259

Phyllis Baxter; Brenda Gilliam;
Glenda Knotts; Alfred Harrison
and Sherri McCorkley,

Appellees,

-versus-

Federal Reserve Bank of Richmond,

Appellant.

=====

O R D E R

The motions in these cases to exceed
the page limitation in plaintiffs' inter-

venors' petition for rehearing and suggestion for rehearing en banc are granted.

The motions for leave to file amicus brief in support of appellees' petition for rehearing and suggestion for rehearing en banc are granted.

A poll of the court was requested on the suggestion for rehearing en banc in these cases. In the poll a majority did not vote to grant rehearing en banc.

It is ADJUDGED and ORDERED, That rehearing en banc be and the same is hereby denied in these cases.

Judge Winter, Judge Phillips, Judge Murnaghan and Judge Sprouse voted for rehearing en banc; Judge Russell, Judge Widener, Judge Hall and Judge Chapman voted against rehearing en banc. Judge Ervin did not participate in the poll of the court

- 190a -

because of disqualification.

Donald Russell
United States Circuit Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte, Division

C-C-77-082

=====

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

Plaintiff,

and

SYLVIA COOPER, et al.,

Intervening Plaintiffs,

-vs-

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

MEMORANDUM OF DECISION

This case was tried before the court from September 8, 1980, to September 17, 1980. At the conclusion of trial, the court from the bench stated that it found that plaintiff-intervenors Sylvia Cooper and Constance Russell had suffered racial

discrimination and were entitled to relief. The court found that plaintiff-intervenors Helen Moore and Elmore Hannah, Jr., did not suffer such discrimination. The court at that time deferred ruling on the existence of a pattern and practice of racial discrimination at the Federal Reserve Bank of Richmond's Charlotte branch. After considering the evidence offered at trial and additional submissions by plaintiffs and defendant, the court makes the following rulings.

Plaintiff-intervenors Cooper and Russell were discriminated against on account of their race and are entitled to relief to be determined at a stage II proceeding. Defendant discriminated against Ms. Cooper by failing to promote her from her job as a settlement clerk in the check collection department to a position as utility supervisor. The

evidence shows that she was qualified for the position and that she had much more experience with the bank than did the white male who was given the job. Defendant discriminated against Ms. Russell by failing to promote her to a utility clerk position from her position as a utility operator. Defendant further discriminated against her by discharging her on January 25, 1975, in retaliation for her filing charges of discrimination with the Equal Employment Opportunity Commission. Plaintiff-intervenors Moore and Hannah have not shown the court that they suffered any discrimination on account of their race, and the court accordingly denies their claims.

The court finds that defendant engaged in a pattern and practice of discrimination from 1974 through 1978 by failing to afford black employees opportunities for advance-

ment and assignment equal to opportunities afforded white employees in pay grades 4 and 5. Defendant has not submitted statistical evidence rebutting plaintiff-intervenors' case with respect to discrimination in those grades. Other than in the above particulars, however, there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief.

Although the court also has an opinion about the entitlement to relief of some of the class members who testified at trial, it will defer decision of those matters to a Stage II proceedings.

Counsel for plaintiffs are directed to propose and submit by December 1, 1980:

1. Proposed findings of fact and conclusions of law consistent with the above findings;

2. Proposed order or orders and partial judgment consistent with the above findings;

3. Proposed order of reference to a special master for a stage II proceedings to determine appropriate relief for plaintiff-intervenors Cooper and Russell; to identify class members entitled to relief; and to determine relief appropriate for those class members; and

4. Proposals, agreed among counsel if possible, for a person or persons available and acceptable to the parties as a special master.

- 196a -

IT IS SO ORDERED, this 29 day of
October, 1980.

James B. McMillan
United States District Judge

Certified to be a true and
correct copy of the original:
U.S. District Court
J. Toliver Davis, Clerk
Western Dist. of N.C.

By _____
Deputy Clerk,

Date _____

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE, DIVISION

=====

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

Plaintiff,

and

SYLVIA COOPER, et al.,

Intervening Plaintiffs,

-v-

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Equal Employment Opportunity Commission (hereinafter referred to as "the Commission" or as "EEOC") instituted this action on March 22, 1977, alleging that the Federal Reserve Bank of Richmond (herein-

after referred to as "defendant" or "the Bank") pursued racially discriminatory employment practices against black employees at its Charlotte, North Carolina facilities in promotions, that the Bank had discriminated against Sylvia Cooper because of her race and sex in refusing to promote her to a supervisory position, and that the Bank had constructively discharged Cooper in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., because she complained about the Bank's racial practices.

Sylvia Cooper, Constance Russell, Elmore Hannah and Helen Moore (hereinafter referred to as "intervening plaintiffs"), black former and present employees of the Bank, on April 20, 1977, requested leave and were allowed to intervene as plaintiffs on September 21, 1977. The intervenors alleged that the Bank limited and denied

employment opportunities to black and female employees because of race and sex and that the intervenors had been adversely affected by these practices. The intervenors further alleged that Cooper had been constructively discharged and that Russell and Hannah had been discharged because of their race and because of their efforts to challenge the Bank's racial practices. The intervenors alleged that the Bank's employment practices violated Title VII and 42 U.S.C. §1981 and requested certification of a class.

On April 26, 1978, pursuant to an agreement of the parties and based on the evidence then of record, the Court allowed the intervenors' motion for class certification and conditionally certified the class under Rule 23(b)(2) and (3), F.R. Civ. P., as follows:

All black persons who have been employed by the defendant at its Charlotte Branch Office at any time since January 3, 1974 [6 months prior to the first charge filed by the intervenors with EEOC], who have been discriminated against in promotion, wages, job assignments and terms and conditions of employment because of their race. 1/

The Court also ruled that EEOC and the intervenors could seek relief on behalf of all black persons who have been denied promotions by the Bank at any time since January 3, 1974 and for intervenor Cooper who allegedly had been denied a promotion and constructively discharged because of her race and sex. The Order provided that the intervenors could also represent

1/ Because the evidence did not warrant it, no class was certified as to the intervenors' sex claims. Defendant moved just before trial that the Court decertify the class. Defendant had also moved at trial to limit the evidence in certain respects. The Court ruled on several of defendant's motions at trial. The remaining motions will be disposed of herein.

black employees who were discriminated against at any time since January 3, 1974, in wages, initial assignments, transfers, and other terms and conditions of employment because of their race and color.

The Bank denied the material allegations of the plaintiff and the intervening plaintiffs.

The case was tried before the Court on September 8-12, 15-17, 1980. At the conclusion of the trial, the Court, from the bench, ruled that intervenors Cooper and Russell had established that they had been discriminated against by the Bank because of race and were entitled to relief. The Court also found that intervenors Moore and Hannah had failed to show that they had been discriminated against. The ruling on the existence of a pattern and practice of discrimination

against the class was deferred. ^{2/}

The Court has now reviewed the evidence, proposed findings, conclusions and judgment ^{3/} and briefs and arguments of the parties and enters the following findings of fact and conclusions of law.

^{2/} By Memorandum of Decision of October 30, 1980, the Court confirmed its ruling from the bench. Additionally, the Court concluded that the evidence established discrimination by defendant against a class of black employees who were in pay grades 4 and 5 at any time between 1974 and 1978. Counsel for plaintiff and the intervening plaintiffs were directed to submit proposed findings, conclusions of law and judgment and a proposed order of reference to a special master for proposed findings and recommendations regarding relief.

^{3/} Following plaintiffs' submission of proposed findings, conclusions and judgment, defendant responded with proposed submissions. The Court has carefully considered the proposals of all parties. The findings and conclusions herein, however, as well as the Judgment which follows are those of the Court based on an independent review of the record and consideration of the submissions of the parties.

FINDINGS OF FACT

1. The Federal Reserve Bank of Richmond is a United States corporation doing business in North Carolina, servicing banks within the State. The Bank has continuously employed more than fifteen (15) employees and is an employer within the meaning of Title VII and 42 U.S.C. §1981.

2. Between January 3, 1974, and the trial of this action, the Bank maintained the following departments:

- Accounting
- Adjustment
- Auditing
- Bank and Public Relations
- Budget and Control
- Building and Equipment
- Cash
- Check Collection
- Data Services
- Fiscal Agency
- General Services
- Personnel (which includes the Cafeteria)
- Protection
- Securities

3. The Bank is charged with four (4) major responsibilities which broadly define its functions: (a) Services to financial institutions and the public, which relates to payments and cash functions for member banks and involves the Check Collection, Adjustment, Cash (formerly Money) and Securities Departments. (b) Service to the U.S. Treasury and governmental agencies, serving savings bonds and other Treasury securities issues, government agency security issues and food stamp activities. The Fiscal Agency, Securities and Cash Departments are involved in this function. (c) Supervision and regulations which involve oversight and administration of various banking regulations. This function is not performed at the Charlotte Branch. (d) Monetary and economic policy, providing economic analysis and information. This function is performed by the

Senior Vice President and the librarian of the Charlotte Branch.

4. Between 1965 and the date of trial defendant employed 400 to 500 full-time employees. Black employees constituted 17-35 percent of defendant's work force. As of 1974, employees were assigned to the various departments as follows:

<u>Departments</u>	<u>White</u>	<u>Black</u>	<u>Per-centage Black</u>
Accounting	24	5	17.2
Adjustment	17	8	22.9
Auditing	6	1	14.3
Bank & Public Relations	1	0	0
Building & Equipment	8	19	70.4
Cash	38	27	41.5
Check Collection	105	59	36
Data Services	15	3	16.7
Fiscal Agency	15	4	21.1
General Services	13	4	23.5
Personnel (including Cafeteria)	9	12	57.1
Protection	26	6	18.8
Securities	4	0	0
Discount and Credit <u>4/</u>	2	0	0

4/ Discount and Credit was discontinued after 1974 and the Bank established a new Budget Control Department.

In 1978, employees were assigned to the various departments as follows:

<u>Departments</u>	<u>White</u>	<u>Black</u>	<u>Per-centage Black</u>
Accounting	19	4	17.4
Adjustment	15	3	16.7
Auditing	4	2	33.3
Bank & Public Relations	1	0	0

<u>Departments</u>	<u>White</u>	<u>Black</u>	<u>Per-centage Black</u>
Budget Control	4	1	20
Building & Equipment	8	14	63.6
Cash	28	20	41.7
Check Collection	66	51	43.6
Data Services	16	4	20
Fiscal Agency	15	5	25
General Services	11	5	31.2
Personnel (including Cafeteria)	9	12	57.1
Protection	24	6	20
Securities	4	0	0

Defendant has also employed approximately 13 part-time employees annually, approximately 3 of whom have been black.

5. Defendant has employed annually between 43 and 65 supervisors. Approximately 20 percent of the supervisors

between 1974 through 1978 have been black, although they principally have been assigned to the cafeteria and to cleaning services.

6. Defendant assigns a Manager to each department and an Assistant Manager to Accounting, Auditing, Building and Equipment, Cash, Check Collection, Fiscal Agency, General Services, Personnel and Protection. Defendant also employs a Senior Vice President, a Vice President and five (5) Assistant Vice Presidents. The Assistant Vice Presidents are assigned supervisor responsibilities over the various departments. 5/

5/ In January, 1978, Thomas Snider, one of the Assistant Vice Presidents was promoted to Vice President. His position as Assistant Vice President had not been filled as of the date of trial as Snider continued basically with his same duties as Assistant Vice President.

7. No black employee has been employed as or promoted to any of the Vice President positions or to Manager or Assistant Manager, except Richard Reeves in 1978 who was promoted to Manager of Auditing. ^{6/}

8. Defendant utilizes pay grades ranging from 1 (the lowest pay grade) through 16, excluding the Vice Presidents. As of 1974, employees were assigned to the following pay grades by race:

^{6/} Helen Moore was employed as Manager of the Cafeteria in 1973. However, the Cafeteria Manager was assigned a lower pay grade and status than Managers of the departments. See paragraphs 36-41, infra.

The parties disputed at trial whether Reeves should be counted among the Charlotte Branch employees since he was employed out of Richmond, the home office, rather than by the Charlotte Branch although he audited the Charlotte Branch. In view of the disposition made herein, it is not necessary to resolve this issue.

<u>Grade</u>	<u>Total Employees</u>	<u>White</u>	<u>Black</u>
Officers	8	8	0
16	1	1	0
15	5	5	0
14	5	5	0
13	11	10	1
12	7	7	0
11	8	8	0
10	21	19	2
9	14	13	1
8	72	55	17
7	50	39	11
6	86	55	31
5	108	54	54
4	51	20	31
3	6	4	2

The pay grade distribution by race in 1978
was as follows:

<u>Grade</u>	<u>Total Employees</u>	<u>White</u>	<u>Black</u>
Officers	7	7	0
16	-	-	-
15	4	4	0
14	7	6	1
13	12	12	0
12	11	11	0
11	8	7	1
10	20	17	3
9	18	15	3
8	65	47	18
7	57	34	23
6	84	46	38
5	37	15	22
4	25	7	18
3	3	2	1

9. Applicants for employment have generally been permitted to complete applications at any time during regular business hours. Applications are retained by Personnel until vacancies occur. Personnel then reviews the various applications on file and forwards those considered qualified to the supervisor with the vacancy for interviews. Final decisions to hire non-exempt employees are generally made by the Managers of the Department or the Vice President who supervises the Department.

10. New employees are generally assigned to entry level pay grades of 3 or 4 based on educational background and prior work experience. No written criteria has been developed by defendant to determine the entry level pay grade to be assigned to employees; rather, this determination is left to the discretion of the supervisor,

Manager and Vice President.

11. Employees in job positions below Manager and Assistant Manager, are generally promoted within departments based on their length of service and qualifications. Factors that have been used to determine qualifications include performance evaluations, work experience both at the Bank and in previous employment and the subjective determinations of the supervisors, Managers and Vice Presidents.

12. Employees are evaluated annually by their supervisors and are assigned the following numerical ratings:

- 5 - Exceptional
- 4 - Highly competent
- 3 - Effective
- 2 - Marginal
- 1 - Unsatisfactory

13. The criteria and procedure used for performance evaluations have not been

validated pursuant to the EEOC Guidelines on Employee Selection Procedures, 29 CFR §1607 et seq.

14. Employees are also promoted across departments if the supervisors determine that no one within their departments is qualified for the particular vacancies. Promotions across departments are generally based on the same factors as promotions from within departments.

15. Since 1973, the defendant has generally posted notices of vacancies by advertising the vacancies in Southern Accent, a news circular prepared by and distributed to Bank employees. Employees indicate their interests in the posted vacancies to their supervisors or the Personnel Department. Even without a vacancy, employees may advise their supervisors and Personnel about their interests in particular job positions and career

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development. The employees' interests are noted for consideration when vacancies occur. On several occasions, defendant has talked to employees who have not bid or expressed an interest in particular jobs and has encouraged them to apply for or to accept assignment or promotion to various jobs.

16. Employees are generally promoted only one pay grade at a time. Thus, if a pay grade 8 vacancy occurs, employees within the department in pay grade 7 are first considered and then employees in the lower pay grades.

17. Managers and Assistant Managers have generally been selected by the Vice Presidents without job postings or notice to employees.

18. Pay increases may be either annual or general pay increases, merit increases (based on employee performance

evaluations) or promotional increases (moving from a lower pay grade to a higher job). Pay increases may also be based on job re-evaluations. For example, if additional duties or skills are added to a particular job, the defendant may assign a higher pay grade to the job.

19. In order to assist employees in their career development with the Bank, defendant may assign the employees temporarily to different jobs for work experience or may select the employees for training at various banking schools. For example, between 1970 and 1977, 33 employees, including 2 blacks, were selected for training at Stovier Graduate School of Banking, LSU School of Banking of the South, the University of South Carolina Bankers School, the University of North Carolina Bankers School and the Treasury Department Schools. Employees have

also been provided tuition refunds for bank related courses. The work experience and courses are considered by the Bank in selecting employees for promotion and other advanced job assignments.

20. Up through 1974, the Bank operated a management trainee program. Employees were trained in this program to move into management positions. Only 2 of the 25 employees selected for this program have been black. ^{7/}

^{7/} The Bank contends that it did not operate a management training program. However, it describes the program and lists 25 employees who have been selected for the program in its statement of the case. The Court has reviewed the evidence and has considered the testimony and demeanor of the witnesses and finds that defendant's contentions regarding this program are simply not credible. Defendant also provided training for 2 white students from Clemson University.

Individual Claims of the Intervening Plaintiffs

21. Sylvia Cooper was employed by the Bank on October 14, 1968. She was initially assigned to the Check Collection Department as a pay grade 3 clerk on the night shift. Cooper promoted to proof machine operator, pay grade 4, on December 20, 1968; to control clerk trainee on April 24, 1970 in pay grade 5 and to control clerk, pay grade 6, on March 26, 1971. She was laterally transferred to return check clerk on December 10, 1973 and promoted to settlement clerk on August 12, 1974 in pay grade 7.

22. Throughout her employment with the Bank, Cooper received high performance evaluations and had an average rating of 3+, a rating between effective and highly competent.

23. Cooper also trained on the

various machines and jobs in her department, including the reader-sorter machine,^{8/} and took outside courses in order to improve her opportunities for advancement.

24. Cooper talked with her supervisors during 1973 and 1974 about her interest in promoting to the utility supervisory position in her department. She was advised that the Bank was pleased with her work and potential and that she would be considered for the job when a vacancy occurred.

^{8/} Defendant contended that Cooper had only trained on the reader-sorter for 2 or 3 months and had not actually programmed the machine. Cooper testified, however, that in working on the machine, she had assisted in and was knowledgeable about all details of the machine. Additionally, defendant's witness admitted that one could learn to operate the machine within a short period of time and that successful operation of the machine was not essential for the supervisory position Cooper was seeking. The Court, therefore, resolves this dispute in testimony of the parties in Cooper's favor.

25. A supervisory vacancy developed in the latter part of 1974 or the early part of 1975. Cooper was not considered for the position although the bank knew of her interest and qualifications. John M. Morgan ("J. Morgan"), a white employee who was hired by the Bank on January 22, 1974, was promoted to the position. J. Morgan was promoted 2 pay grades, from pay grade 6 to pay grade 8, contrary to defendant's general practice of promoting only one pay grade. Cooper was in pay grade 7 and her promotion would have been more consistent with defendant's practice.

26. J. Morgan had worked as a control clerk trainee from January 1974 until May 15, 1974, and as a reader-sorter operator from August 12, 1974 until February 10, 1975. He held a Bachelor of Arts degree in Biology. His average performance rating was 3. He had less work experience

on various jobs and machines in the Bank than Cooper.

27. According to defendant's records, J. Morgan was assigned as a utility supervisor. Defendant contended that this was a mistake as J. Morgan was principally to supervise the reader-sorter operators. The job description for reader-sorter supervisor requires 1 year of previous experience "to learn departmental procedures" and 6 months to 1 year of additional training after selection "to become familiar with duties involved." The job duties do not require any high degree of technical training. Defendant conceded that one can learn the job responsibilities within a short period of time.

The job description for utility supervisor in Check Collection, the job to which J. Morgan was assigned, requires one year of experience in lower level jobs

in the Department "to learn departmental operations" and 3 to 6 months of additional training after appointment "to become familiar with duties involved." The utility supervisors fill in for the regular supervisors in supervising all employees in the Department, including the reader-sorter employees, and assist the Assistant Manager of the Department.

J. Morgan performed the same duties as prescribed for utility supervisor.

9/

He was listed on the Bank records as being assigned to this position rather than to reader-sorter supervisor. Moreover, when defendant announced to employees

9/ In view of the testimony regarding Morgan's duties, the demeanor of the witnesses and the record evidence, the Court refuses to accept defendant's assertions that J. Morgan was a reader-sorter supervisor. Even if J. Morgan were reader-sorter supervisor, Cooper was more qualified than J. Morgan according to defendant's records to fill the position and was more experienced with the Bank.

in June 1974 that J. Morgan had been selected, defendant advised that J. Morgan was to supervise all employees in the Department rather than just reader-sorter operators. 10/

28. Despite J. Morgan's selection on February 10, 1975, defendant did not advise Cooper of her non-selection until June 25, 1975. Cooper then became upset and disturbed because she had been passed over in favor of a white employee who was junior to her in length of service. Additionally, her co-workers knew that she was in line for the promotion and it was embarrassing and disturbing to her to be passed over and

10/ Defendant also selected Michael W. Morgan on March 23, 1973, and David T. Lord on October 7, 1974, for the utility supervisor position. Michael Morgan and Lord worked on different shifts. Both had trained in defendant's management trainee program and although they were junior in date of employment to Cooper, the Bank did not consider her for either of these positions.

not even considered. At the end of her work shift, she went to the Personnel Department to discuss the promotion. She complained about being passed over and receiving no assurances and submitted a letter of resignation. She was advised that she should think more about the matter and was assured that her letter would not be submitted to management until 12:00 noon on June 26, 1975. Cooper then went home but called Personnel before 12:00 noon and requested that her letter of resignation not be submitted. She said that she would like to continue employment with the Bank. She was told, however, that her 11/ letter of resignation had been accepted.

11/ Defendant contended that no assurances were given Cooper that her letter of resignation would be withheld until 12:00 noon. Defendant's only witness, Troy Wilson, admitted, however, that she "may" have given Cooper such assurances.

Cooper's employment was, therefore, terminated on June 26, 1975. Except for her complaint and conditional letter of resignation, Cooper would not have been discharged. Cooper submitted a letter of resignation only because she had been discriminatorily denied promotion to the supervisory position because of her race.

29. Constance Russell was employed by the Bank on October 19, 1971. She was initially assigned as a grade 4 proof machine operator in the low speed section of Check Collection. She was promoted to first run, proof machine operator, grade 5, on November 5, 1972 and to high speed checker in October 1973. She was reassigned to the first run section shortly thereafter with the assurance that she would receive a new title, would have supervisory responsibilities and would receive a pay grade increase. She was

advised that she was needed in first run to train new employees.

30. After reassignment to first run, Russell received neither a change in job title, nor an increase in pay. She complained to her supervisors and Manager that she was being discriminated against because of race. She was then advised that her job title was being changed to utility clerk, that she would have supervisory responsibility and status and a pay grade increase to 6. Russell later learned, however, that she was being treated differently than the white supervisors in her department. For example, she was not invited or allowed to attend the periodic supervisory conferences. Russell again complained that the Bank was treating her differently because of race. Her supervisors then advised her that she was not a supervisor but would have to remain

in the Department and job position.^{12/}

31. Following Russell's initial complaint to her supervisors, Russell began to receive complaints about her work, attendance and relationship with fellow employees. For example, Russell received a 5 or exceptional performance evaluation in 1973 before she complained to her supervisors. Thereafter, she received unsatisfactory or low performance evaluations. Her supervisors entered in her personnel file memoranda indicating that some fellow employees had complained about their

^{12/} Defendant contended that Russell was reassigned as a utility clerk and that that position carries no supervisory responsibilities. Supervisors in the Department, however, were listed as utility clerk A (for example, employees Mauney and Moore) and they did the same work as Russell. Moreover, the Court has carefully reviewed the testimony of defendant's witnesses, their demeanor at trial and the documentary evidence and refuses to give credence to defendant's assertions.

relationship with her. She was unfairly cited for poor attendance and for refusing to assist on other jobs in the Department although she had previously sought to perform other jobs and had been denied the opportunity.

32. Russell had requested promotion to a supervisory job or to other jobs which would allow her to promote to higher pay grades. After learning that her reassignment to first run did not carry supervisory responsibilities and would limit her ability to promote to better jobs she renewed her efforts to promote or to transfer, to no avail.

33. In December, 1974, she talked with the Senior Vice President about her efforts to promote and to receive pay increases and was offered no assurances.

34. In January 1974, she was called in by management and advised to transfer to

another division and job. She asked if she would be provided training to learn the job but was offered no assurances. Fearing that she would not be provided training and would be discharged, she refused to transfer. She requested that she be allowed to keep her present position, at least until she could promote to a job she knew or would be provided training on another job. The Bank refused and discharged her on January 24, 1975. ^{13/}

^{13/} Defendant suggested that its offer to transfer Russell to another department and job position was to enable her to remain with the Bank. Defendant also offered comparisons of other employees with attendance problems allegedly similar to Russell. The complaints against Russell, however, came only after her charges that she was being discriminated against because of race. There was no showing that Russell's job performance was any different than before she complained, although she received lower performance ratings after her charge. No explanation was offered for defendant's refusal to provide Russell with supervisory status in 1973 or 1974 other than that a utility clerk was not a

13/ continued

supervisory position. The utility clerk A position was a supervisory position; two white employees were assigned to this position; and no explanation was offered for defendant's failure to assign Russell as utility clerk A. Defendant denies that it promised Russell supervisory status. Viewing the evidence and the testimony of the parties, the Court finds that Russell correctly described what transpired.

Moreover, complaints about Russell's work came only after she alleged that her supervisors were treating her differently and denying equal job status to her because of her race. Russell's pay increase was delayed. She was charged with poor attendance, threatened with dismissal, denied temporary assignment to Adjustment despite her request and then labelled as uncooperative when she later refused to transfer. Finally, the January 1975 offer to transfer was without definite job assignment or assurance that on-the-job training would be provided. Had defendant wanted to transfer Russell, it would have indicated a definite job position with assurances that Russell, like other employees, would be provided reasonable training and assistance to learn the job position. Defendant offered no explanation for its failure to do so and the Court finds defendant's assertion simply a pretext to discharge Russell.

35. Russell had been denied a job assignment and job status commensurate with her qualifications despite the assurance she had been given by her supervisor. She complained and received the pay increases she had been promised only because of her persistence. White employees were not subjected to similar practices. Russell alleged that she was being treated differently because of her race and filed a charge with EEOC. Thereafter, she was subjected to harassing tactics by her supervisors, was directed to transfer to another department with no specific job assignment and was discharged when she refused.

36. Helen B. Moore was employed by the Bank on October 24, 1973, as Manager of the Cafeteria. She held a Bachelors degree in Nutrition and had approximately 5 years of experience as a dietician and

cafeteria manager.

37. Moore replaced Agnes McDaniels, a white employee, who had managed the Bank's Cafeteria for 12 years. Moore was assigned to the same pay grade (grade 10) which McDaniels held at the time of her resignation and assigned the same duties.

38. Although Moore's job title was Manager, she was not given the same status as Managers of other departments because of the size and volume of service of the Cafeteria. Rather, the Bank placed the Cafeteria under the supervision of the Personnel Department. The Assistant Manager of Personnel supervised the operation of the Cafeteria, prepared the budget and approved expenditures.

39. McDaniels did not hold a college degree. The Bank, however, compensated Moore for her training and experience by starting her at a higher pay grade and

higher step within the pay grade than initial hires. Moore also received step increases in April and December, 1974, and December 1975 and 1976, and a pay grade increase in April 1977, as a result of the re-evaluation of her job.

40. Moore supervised practically an all-black Cafeteria staff. She and the staff were subjected to derogatory remarks but this problem was corrected after Moore complained to the Department Manager.

41. Because she did not have the status of Department Manager, Moore was not allowed to attend the periodic meetings of Managers. She also was not allowed to serve on the Management Committee, which was limited to employees in pay grades 11 and above. McDaniels was also denied the opportunity to attend managerial meetings and to serve on the Management Committee. After the re-evaluation of her job and

grade increase in 1977, Moore became eligible for membership on the the Management Committee and was subsequently selected.

42. Elmore Hannah was employed by the Bank on May 23, 1973, as a cleaner in the Building and Equipment Department. Hannah was employed through the Bank's handicapped program. He had a speech defect and problems with coordination.

43. Hannah made several requests for transfer or promotion to their job positions and departments but, because of his handicap, was unable to perform the jobs he requested.

44. Beginning in January 1976, the Bank began to reduce its work force in Hannah's Department and shift. Hannah was offered a transfer to another shift in the same job position without a reduction in pay. Hannah refused, stating that he was enrolled in school and the proposed

shift would conflict with his class schedule. Hannah also suggested that some cleaners, junior in employment to him, should be transferred.

45. The junior employees to whom Hannah referred were all black. Additionally, school records indicated that Hannah was not enrolled in school and had not been enrolled for several months prior to the directive from the Bank for Hannah to transfer to another shift.

46. Hannah was discharged on March 10, 1976, because of his refusal to transfer to another shift.

Exhaustion of administrative remedies

47. Intervenor Cooper filed a charge of employment discrimination with EEOC on June 26, 1975, alleging that the Bank had discriminated against her and other black and women employees because of race and sex. A copy of her charge was mailed to

the Bank on or about July 28, 1975.

48. EEOC investigated Cooper's charge and issued a reasonable cause determination on March 8, 1976. On the same date, EEOC invited the Bank to conciliate the charge but was advised by the Bank on April 2, 1976, that conciliation would not be appropriate. On April 20, 1976, EEOC advised the Bank that conciliation had failed and that conciliation efforts would not be renewed unless requested by the Bank within 5 days. The Bank made no request for further conciliation efforts.

49. Russell filed her initial charge of employment discrimination with EEOC on July 9, 1974. She filed amended charges alleging retaliation on October 11, and October 29, 1974 and January 23 and 24, 1975. Notices of the charges were duly served on the Bank. Russell alleged

basically the same issues as raised in Cooper's charge including an allegation that she had been deprived of rights under §704(a) of Title VII, 42 U.S.C. §2000e-3(a).

50. Hannah filed his charge with EEOC on March 10, 1976. Hannah alleged that he had been denied promotions and discharged because of his race.

51. Helen B. Moore filed charges with EEOC on October 29, 1974, and January 28, 1975. Moore alleged that she had been denied a job position and status, passed over for promotion and retaliated against because of her race and in violation of §704(a) of Title VII. Copies of her charges were properly served on the Bank.

The class claims

52. Prior to 1965, the defendant limited the employment of blacks to basic-

ally cleaning positions and the Cafeteria. After the effective date of Title VII, July 2, 1965, defendant began to employ more black employees and to assign them to various departments. For example, in 1966, 17.7 percent of defendant's employees were black. This percentage had increased to 35.7 percent by 1978.

53. In 1966, no black was in a pay grade above grade 7. By 1978, one black was in pay grade 14, one in grade 11, 3 in grade 10, 3 in grade 9, and 18 in grade 8. Fifty-three (53) percent of the black employees, however, were in pay grades 6 and below, as compared with 26 percent of the white employees.

54. In 1974, 60 percent of the black employees were in cleaning positions and the Cafeteria as compared with 7 percent of the white employees. In 1978, 21 percent of the black employees were in

cleaning and Cafeteria positions as compared with 9 percent of the white employees. Fiftyfive (55) percent of the black employees in 1978 were in Cash and Check Collection. Forty (40) percent of the white employees were in these two Departments.

55. At the time of trial, black employees were still in lower pay grades and in discernible Departments -- grades 6 and below and in Building and Equipment as cleaners and in Check Collection, Cash and in the Cafeteria.

56. Both plaintiffs and defendant submitted statistical evidence regarding the initial job assignments and pay grades, performance evaluations and average time of promotion of comparably situated black and white employees. Except for promotions from pay grades 4 and 5, plaintiffs' and defendant's data for the period 1974-79

indicated no statistically significant difference in the initial job assignments and pay grades, performance evaluations or promotion of black and white employees.

57. For pay grades 4 and 5, for the period 1974-1977, plaintiffs' data established the following:

Promotion Out of Grade 4

Year	Total Incumbents At End Of Inter- val	Total Black Incumbents & Percent- age	Total Promo- tion	Total Black Promo- tion	Expected Pro- motion	
1974	68	45(66%)	43	25	28.3	-3.3
1975	41	24(59%)	13	7	7.6	-.6
1976	22	15(68%)	7	2	4.8	-2.8
1977	<u>23</u>	<u>16(70%)</u>	<u>3</u>	<u>1</u>	<u>2.1</u>	<u>-1.1</u>
Total	154	100(65%)	66	35	42.9	-9.9

Number of Standard Deviations -2.69

Promotion Out of Grade 5

Year	Total Incumbents At End Inter-val	Total Black Incumbents & Percent-age	Total pro-mo-tion	Total Black Pro-motion	Expected Black Pro-motion	Difference
1974	80	34(43%)	37	13	15.9	-2.9
1975	86	44(51%)	24	12	12.2	- .2
1976	62	34(55%)	31	16	17.0	-1.0
1977	<u>41</u>	<u>23(56%)</u>	<u>15</u>	<u>5</u>	<u>8.4</u>	<u>-3.4</u>
Total	269	135(50%)	107	46	53.5	-7.5

Number of Standard Deviations -2.01

Plaintiffs' tables show statistically significant disparity at the 5 percent level of reliability between the number and percentage of black employees promoted out of pay grades 4 and 5 as compared with their availability for promotion from these grades. The disparity existed both with respect to each year and for the combined years 1974-1978.

58. Plaintiffs' analyses for these grades were confirmed by defendant's exhibits. For example, defendant's exhibit 111 shows that between 1967-78, black employees received 47.4 percent of the promotions out of grade 4 while constituting 52.6 percent of the employees available for promotion. White employees received 52.6 percent of the promotions out of grade 4 while constituting 47.4 percent of the available employees. Black employees receive 40 percent of the promotions out of grade 5 while constituting 53.5 percent of the employees. White employees in grade 5 constituted 46.5 percent of the available pool, but received 60 percent of the promotions. Defendant's exhibit 113 for 1974 through 1978 shows this same disparity by year. Defendant's exhibit 128 shows that black employees in grade 4 received higher job performance evaluations

during this period although a lower percentage of promotions.

Defendant's exhibit 129 shows that black employees, between 1966-77, remained in grade 4 for an average of 982.2 days as compared with 652.5 days for white employees. White during this period remained in grade 5 an average of 591.2 days as compared with 530 days for black employees.^{14/}

59. In order to determine if the disparities in promotion in grades 4 and 5 were caused by differences in background characteristics, plaintiffs produced a study which matched black employees with white employees of similar lengths of service at the Bank, similar grades, similar lengths of time in grades, similar departments and similar educational

^{14/} Plaintiffs' data show a longer period in grade 5 for black employees and are more reliable since defendants' analyses exclude first promotions after initial employment.

levels. The analysis demonstrated disparate treatment in promotion of black employees as compared with similarly situated white employees. Black employees were less likely in all years to be promoted. The pattern over the four year period produced a deviation which could not have occurred more than 5 in 100 times by chance. The study was conducted pursuant to accepted statistical methodology.^{15/}

^{15/} Plaintiffs' analysis established the following disparities:

DIFFERENCES IN PROMOTION RATES AND
SIGNIFICANCE AT .05 LEVEL

<u>Year</u>	<u>STANDARD ERROR</u>	<u>P VALUE</u>	<u>-2LOG_eP</u>
1974	-1.79284	.0367	+6.61
1975	+.32216	.6217	+ .94
1976	-1.41706	.0777	+5.11
1977	-1.00574	.1588	+3.68
TOTAL			16.34

CHI-Square C.V. at .05 and 8.d.f. = 15.5073

60. Black employees were also more likely to be assigned to cleaning and Cafeteria positions where no job preference was indicated on their application for employment. Thus, between 1966-1978, 91 black employees and 263 white employees indicated no particular job preference on their application. Three of the black employees and no white employees were assigned to cleaning jobs.

61. More than 50 black employees in grade 4 and 5 have been affected by defendant's practices. Defendant's exhibit 233, for example, shows that 43 black employees were assigned to grades 4 and 5 between 1974-1978. Defendant's exhibit 101 shows 85 black employees in these grades at year-end 1974, 61 as of 1975, 42 as of 1976, 41 as of 1977, and 50 as of 1978. Plaintiffs' exhibits 34a and 35a show more than 100 instances of black employees in

grade 4 and 5 being passed over by white employees with no greater qualifications.

62. The Bank used the same criteria and procedure for promoting employees from grades 4 and 5 as indicated in paragraphs 11-16, supra, which govern promotions in all pay grades. The Bank considered length of time in service, performance evaluations, previous experience and recommendations of supervisors. As vacancies occurred, the Bank attempted first to promote from within departments and the next lower pay grades. It went to other pay grades or other departments when supervisors indicated that they did not feel that the initial candidates were qualified. These determinations were generally made by a substantially white supervisory and managerial staff. The employees involved in plaintiffs' study and in that of defendant had basically the same objective character-

istics, including departments, education and experience, leaving no basis except race for the difference in treatment of the black employees.

63. Defendant offered no evidence to explain the disparity in treatment of black employees in promotion from grades 4 and 5.

64. In addition to the statistical data, plaintiffs offered oral testimony of present and former employees who had been retained in grades 4 or 5. Others had subsequently promoted from these grades but had experienced additional problems in their employment opportunities after promotion. Constance Russell was unable to promote from grade 5, despite promises of her supervisors, until she complained that she was being denied a pay increase because of her race. She was given a pay grade increase 2 months after being assigned to

the position.

65. Emma H. Ruffin, a black employee, was employed by the Bank through the local, federally funded Concentrated Employment Program on June 5, 1972. She applied for a typist or file clerk position but was assigned as a grade 3 messenger. Ruffin is a high school graduate with one and one-half years of commercial training at Central Piedmont Community College. Beginning in 1973, Ruffin requested promotions to several jobs -- a file clerk position in 1973 and 1975, an operator's job in Check Collection in 1975, a clerk typist job in 1976. These jobs were assigned to junior white employees. In 1974, Ruffin applied for and was assigned to the position of addressograph-messenger at pay grade 4. Her job was re-evaluated to a pay grade 5 in November 1978. She has not been promoted to another

job or higher pay grade.

66. Phyllis Baxter, a black employee, was employed by the Bank on October 5, 1970, as a grade 5 accounting clerk. She promoted to a grade 6 reconciliation clerk on May 21, 1971. Between 1975 and 1978, she applied for a general ledger position, a wire transfer position and a safekeeping position, all of which went to junior white employees. Baxter terminated her employment on December 7, 1978, because of her inability to promote.

67. Brenda Gilliam, a black employee, was employed by the Bank on January 30, 1973, as check collection clerk, grade 4. She received a grade 5 promotion on July 29, 1974. She promoted to reader-sorter operator, grade 6, in August 1975, and to senior reader-sorter operator, grade 7 on May 16, 1977. Gilliam had trained as a computer operator. She applied for a

junior computer console position which went to Charles Yates, a white employee, in November 1976. Yates was employed as a grade 5, clerk trainee on December 17, 1973, approximately 10 months after Gilliam. He promoted to grade 6 on February 10, 1975, and to grade 7 on April 5, 1976. He transferred laterially to the console position which Gilliam requested in 1976 and was able to promote to grade 8 in December 1977, and to grade 9 in December 1979. Gilliam wanted the console position because it would have enabled her to promote to higher pay grades. She had more seniority than Yates and was equally qualified.

68. Glenda Knott, a black employee, was employed by the Bank on April 20, 1970. Knott had previously been employed by the Federal Reserve System in Washington as a grade 9 employee. She was advised that

employees could not transfer from the Federal Reserve System to the Bank and was required to take a grade 5 file clerk position in General Services at a substantial reduction in pay. She promoted to a grade 6, transfer clerk in Accounting on November 6, 1970; a grade 7, safekeeping clerk on February 2, 1971; and a grade 8, utility clerk on November 9, 1971. The utility clerk position was re-evaluated to a grade 9 on March 22, 1976, which is the job grade Knott held at the time of trial. Knott is a high school graduate with 2 years of college. Because of her interest in being promoted or assigned to higher pay grades and job positions, she took additional training after being employed by the Bank, including supervisory-management training, and training at the North Carolina Banking School and the American Institute of Banking. She has received a 4

or highly competent performance evaluation in each year, except on one category in 1974, and this came after Knott complained about her inability to promote.

69. Knott requested a supervisory position in Accounting in 1974. Faydeen Wilson, a white employee, who was hired by the Bank in 1963, was selected for the position. Knott was told that she was needed elsewhere in the Department rather than in the job position to which Wilson was assigned. Knott requested the Assistant Manager's position in 1976, to which Gary Nesbitt, a white employee was assigned. Nesbitt was hired on July 28, 1970. He had a high school diploma and 3 years of college training. His performance ratings were lower than those of Knott. Nesbitt was promoted to grade 12 on December 27, 1976. The only explanation offered by the bank for Nesbitt's selection

over Knott was that Nesbitt's supervisors felt that he had better potential although his performance ratings were not as high. Knott was qualified for the position according to the defendant's job descriptions. Knott was also passed over for the supervisory position to which Linda Woolen, a white employee was assigned in 1976. Woolen was hired in 1968 but had no greater qualifications than Knott. Defendant indicated that Woolen had been considered an assistant supervisor since 1974. No such job position existed, however, and there was no notice to other employees at the time that such an assistant supervisory position was open. Patricia Hughes, a white employee, was also promoted to supervisor over Knott in 1978. Hughes was a high school graduate, with a lower performance rating and no greater qualification than Knott. Defendant offered no

explanation for Hughes' promotion over Knott.

70. Knott complained to her supervisors about her inability to promote and the promotion of junior employees, or employees with less or no greater qualifications over her. Following her complaint, she received her only marginal rating for allegedly "[Experiencing] some difficulty in getting along with others; Lacks diplomacy." This rating was based on her complaint that she was being denied promotions because of her race. She was further criticized by her supervisors she was being denied promotions because of her race. She was further criticized by her supervisors and advised that the bank felt that she was progressing fairly. Although qualified, Knott still had not been promoted to a supervisory position at the time of the trial, although vacancies

have existed.

71. Alfred Harrison, a black male, was employed by the bank in a grade 3 position in 1975. Harrison was an honorably discharged veteran, experienced and qualified with Army weaponry. He applied for a guard position in Security in 1978 but was rejected, although the Bank preferred veterans for guard service. He made an adequate showing on the tests for the position. A white employee was hired to fill the vacancy requested by Harrison. Harrison terminated his employment shortly thereafter because of his inability to promote.

72. Sherri McCorkle, a black employee, was employed by the Bank in November 1972. She started in grade 4 and promoted to grade 6 in 1976. Her job position was re-evaluated in 1977 to grade 7 but she and other blacks in her job

position were denied reclassification by the Bank's application of different standards. McCorkle had not been reclassified at the time of trial.

73. The Bank failed to select black employees for Bank training courses according to their availability. At the time of trial, only 2 black employees out of 33 had been selected by the Bank for such courses although black employees constituted more than 30 percent of the potential candidates. The Bank offered no explanation for this disparity.

74. The intervenors are adequate representatives of the black employees who, because of their race and color, have been retained in grades 4 and 5 while junior white employees or white employees with less or no greater qualifications have been promoted to higher pay grade positions. The intervenors have demonstrated their

interests in this proceeding and in representing and protecting the interests of absent class members. The intervenors are represented by competent counsel who are experienced in litigating class action employment discrimination cases and have established their ability to represent the class adequately and effectively.

75. In limiting and denying employment opportunities to black employees in grades 4 and 5 because of their race, defendant has acted in ways common to the intervenors and the class, thereby making appropriate final injunctive or declaratory relief. Additionally, this proceeding has shown that a class action is preferable to a number of separate trials raising the same factual and legal issues. The time and convenience of the Court and the time of and costs to the parties are best served by a single class action proceeding.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action and of the parties to this proceeding under Title VII, 42 U.S.C. §2000e et seq. The intervening plaintiffs timely filed charges with EEOC. EEOC processed Cooper's charge through a reasonable cause determination, offered to conciliate but defendant refused, and EEOC timely instituted the proceeding. See Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977). Intervening plaintiffs Cooper, Moore, Russell and Hannah obtained right-to-sue letters and timely intervened. 42 U.S.C. §2000e-5(f)(1); see McClain v. Wagner Electric Corp., 550 F.2d 1115, 1119-22 (8th Cir. 1977); Braxton v. Virginia Folding Box Co., 72 F.R.D. 124 (E.D. Va. 1976). Additionally, they have properly invoked the Court's jurisdiction under 42 U.S.C. §1981. See Johnson v.

Railway Express Agency, Inc., 421 U.S. 454 (1975); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).

2. The Court previously conditionally certified the class which the intervening plaintiffs could represent under Rule 23(b) (2) and (3) as:

All black persons who have been employed by the defendant at its Charlotte Branch Office at any time since January 3, 1974, who have been discriminated against in promotions, wages, job assignments and terms and conditions of employment because of their race.

EEOC was permitted to seek relief on behalf of all black persons who have been denied promotions by the Bank at any time since January 3, 1974. EEOC was also allowed to seek relief for the sex discrimination claim of Cooper.

EEOC represents all members of the class as well as all black individuals, within the class as originally defined, who have been denied promotions to job posi-

tions and pay grades because of race and who have been discriminatorily discharged or harassed or intimidated because of their efforts to exercise rights under Title VII. General Telephone Company of Northwest, Inc. v. EEOC, 48 U.S.L.W. 4513 (May 12, 1980).

With respect to the intervenors, the class contains more than 50 black employees who have been adversely affected by defendant's promotion practices from grades 4 and 5. Intervenors Russell and Hannah were similarly affected. The class is too numerous to make practical the joinder of all class members.

The claims of the intervenors and of the class raise common questions of law and fact. The claims of the intervenors are also typical of those of the class. The intervenors and the plaintiff have shown that over an extended period, including the

time period relevant to this proceeding, the defendant has failed to promote black employees from pay grades 4 and 5 on the same basis as similarly situated white employees solely because of race. No changes had been made in these practices even at the time of trial. The defendant has failed to offer a reasonable, non-racial basis for its action. Plaintiff and the intervenors have, therefore, demonstrated a consistent pattern and practice of racial discrimination by defendant in the promotion of black employees from grades 4 and 5. See Harriss v. Pan American Airways, Inc., 74 F.R.D. 24 (N.D. Cal. 1977).

The intervenors are adequate representatives of the class. They have advanced and protected the interests of the class throughout this proceeding. They are represented by counsel who are experienced

in equal employment class action proceedings.

The time period covered by this proceeding is January 3, 1974, or 6 months prior to the initial charge filed by the intervenors, through the date of trial. Some of the individuals for whom relief is warranted neither filed charges with EEOC, nor have they moved to intervene in this proceeding. They were, however, in the original class as defined by the Court or within the scope of individuals whom the Court has determined might properly be represented by EEOC. On the basis of the charges filed by intervenor Cooper, EEOC investigated claims of racial discrimination in promotion in all pay grades. A decision was issued involving the discriminatory denial of promotion to black employees in all pay grades. EEOC offered to conciliate the claims but its efforts

were rejected by defendant. EEOC then instituted this proceeding, challenging defendant's practices with respect to promotion in all grades. Thus, while the class represented by the intervenors is limited to black employees who were discriminatorily denied promotions because of race, EEOC may also represent employees in all grades who, during the period indicated were discriminatorily denied promotion or discriminatorily disciplined or retaliated against because they complained about defendant's racially discriminatory employment practices. EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976).

3. Plaintiff and the intervenors may establish a violation of Title VII or 42 U.S.C. §1981 by either showing disparate impact of racially neutral practices of defendant which discriminated against black employees or discriminatory treatment

by defendant in providing employment opportunities for black candidates. In order to establish discriminatory treatment, plaintiff and the intervenors must also show motive or intent. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Under either theory plaintiffs may employ statistics. Teamsters, supra at 336.

4. If plaintiffs prove a prima facie case under either approach, they establish a rebuttable presumption of liability which requires that the defendant "articulate" a reasonable, non-racial basis for its action. Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Funda v. Muhlenbenberg College, 22

EPD ¶ 30,674 (3rd Cir. 1980). If defendant presents an explanation, plaintiffs may show that defendant's justification is pretextual. McDonnell-Douglas Corp. v. Green, supra. The burden of proof of liability, however, remains with the plaintiffs whether or not defendant offers an explanation for its action. Furnco Construction Co., supra.

5. Plaintiff and the intervenors have demonstrated disparate treatment as to Cooper and Russell, but not as to Moore and Hannah, and disparate treatment and impact as to the class of black employees in grades 4 and 5.

6. Sylvia Cooper sought to promote to a supervisory position in her department in 1975. She had been with the Bank for 7 years, had received good performance reviews and had previously promoted to grade 7, the grade immediately below the

supervisory vacancy. John M. Morgan, a white employee, however, junior in service to Cooper and 2 pay grades below the supervisory position, was chosen over her. The evidence establishes a prima facie case of liability under McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Cooper is a member of the class of protected employees under Title VII; she actively sought to advance to a higher job position and pay grade; a vacancy existed; she was qualified for the position but was passed over by a junior white employee who was less qualified or no more qualified for the position than Cooper. See Page v. Bolger, ___ F.2d ___, 21 FEP Cases 775, 783-86 (4th Cir. 1980); Jepsen v. Florida Board of Regents, 610 F. 2d 1379, 1382-83 (5th Cir. 1980).

7. As an explanation for the selection of Morgan over Cooper, the Bank indicated that Morgan was a college grad-

uate who had worked longer on the reader-sorter machine than Cooper; that Cooper had not qualified to run the machine although she had worked on it for approximately 2 months; and that it was necessary for the supervisor to have knowledge of the machine since the supervisor would principally be supervising reader-sorter operators. A brief analysis of the Bank's explanation, however, demonstrates it pretextuality. First, Cooper was never considered for the position, despite her qualifications and pay grade and the promises made to her by her supervisors. Defendant's explanation is an attempt to justify Morgan's promotion without initially comparing his qualifications with Cooper. Second, the job position to which Morgan promoted did not require a college degree. Morgan's degree was in Biology and there has been no showing that such education was in any way

relevant to the job position in question. Third, Morgan was promoted to the position of utility supervisor and not reader-sorter supervisor. The evidence establishes that he worked as utility supervisor rather than principally as supervisor of the reader-sorter operators. In fact, Cooper knew the reader-sorter machine and would have been able to supervise the reader-sorter operators even if the vacancy had been that of the reader-sorter supervisor. As indicated, however, the position was that of utility supervisor and Cooper, because of her work experience, was more qualified to fill this vacancy than Morgan. Fourth, the Bank failed to follow its usual practice of initially evaluating employees in the grade immediately below the position to be filled before considering other employees and of not promoting employees two or more pay grades if qualified employees were avail-

able in higher pay grades. Cooper was in a higher pay grade, was qualified and was next in line for the position. Therefore, assuming arguendo that defendant has articulated a reasonable, non-racial explanation for its failure initially to consider or to promote Cooper, that articulation has been shown to be pretextual. The Court concludes Cooper was not promoted because of her race. See Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). Cooper was not accorded the same consideration for promotion as comparably situated white employees.

8. Cooper was notified in June 1975 that Morgan had been selected for the position. She and her fellow employees had anticipated Cooper's promotion because of Cooper's senior status and qualifications. She was embarrassed by being passed over and having to confront the other employees

in her Department. Cooper sought some explanation through Personnel and, receiving none, submitted a letter of resignation. She was assured that her letter would be held until 12 o'clock noon on June 26, 1975, but was subsequently advised that her employment had been terminated before 12 o'clock noon.

9. Cooper had an exceptional performance rating; her attendance was good. There was no basis for the Bank's termination of her employment. She was misled by the Bank in being advised that her letter of resignation would be held and not acted on until noon. The letter was submitted only because of the Bank's preferred treatment of Morgan and the embarrassment and unfavorable working environment to which Cooper was thereafter subjected. Under the circumstances, the termination of her employment constituted a constructive

discharge in violation of §403(a) of Title VII, 42 U.S.C. §2000e-2 (disparate treatment because of race) and §704(a) of Title VII, 42 U.S.C. §2000e-3(a) (retaliation because of efforts to exercise rights under Title VII). Sherrill v. J.P. Stevens & Co., 410 F. Supp. 770 (W.D.N.C. 1975), aff'd, 551 F.2d 308 (4th Cir. 1977); cf. DeGrace v. Rumsfeld, 22 EPD 30,621 (1st Cir. 1980); Calcote v. Texas Educational Foundation, 578 F.2d 95, 97-98 (5th Cir. 1978); Young v. Southwestern Savings & Loan Ass'n., 509 F.2d 140 (5th Cir. 1975).

10. Constance Russell was denied promotion to a supervisory position in 1974 despite her qualifications and the existence of a vacancy. Russell had trained on the low and high speed machines in her Department. She was asked to go back to low speed in order that she could train new employees. She was advised by her supervi-

sors that she was the best qualified employee for the position, that she would be promoted in grade and she would have supervisory status and responsibilities. After accepting the position, Russell was denied supervisory status and a pay grade increase. She complained that she was denied supervisory status and pay because of her race. She later received a pay grade increase but has continuously been denied supervisory status. Russell's evidence demonstrates disparate treatment because of her race under McDonnell-Douglas, supra.

11. In explanation of its treatment of Russell, defendant asserted that she was reassigned to the position of utility clerk which is not a supervisory job. Defendant also denied that it promised a supervisory position to Russell. Defendant failed to explain, however, why Russell was not

assigned to the position of utility clerk A, a supervisory job which, in fact, is more relevant to the job duties Russell was assigned. Two white employees were classified as utility clerk A, attended periodic meetings with other supervisors in the Department, but were performing duties similar to Russell's. Moreover, despite defendant's assertions^{16/} that Russell was not promoted to a supervisory position, the Court is persuaded by the documentary evidence and the testimony of the parties that Russell was promised the position, was assigned duties to train and to supervise

^{16/} As indicated in the findings of fact, the Court has had to resolve conflicting evidence and testimony in several instances. In each case, the Court has reviewed the documentary evidence, the manner and demeanor of the witnesses and, where appropriate, has indicated whether the evidence of the plaintiffs or the defendant was more reliable. The Court finds here that the defendant's assertions are not credible.

other employees, that a supervisory vacancy existed, but that Russell was denied supervisory status solely because of her race. See United States v. Commonwealth of Virginia, ___ F.2d___ (4th Cir. Nos. 78-1764, 78-1765 and 78-1840, April 7, 1980); Sweeney v. Board of Trustees of Keene State College, supra; Kunda v. Muhlenbenberg College, ___ F.2d___, 22 EPD ¶30,674 (3rd Cir. 1980).

12. Following Russell's complaint that she was being treated differently because of her race, she was subjected to harassing and intimidating practices by her supervisors. She was given unfair adverse performance evaluations, threatened with termination of her employment, and denied the opportunity to assist in Adjustment with others in her Department. She was later directed to transfer to an indefinite position in Adjustment with no assurance

that she would be trained and discharged when she refused to transfer under such conditions. Defendant offered no explanation for its failure to designate a job position in Adjustment for Russell or for failing to ensure that she would be trained on whatever job position to which she would be assigned Russell's treatment in this respect is clearly different from that defendant has accorded other employees under similar circumstances and can only be explained on the basis of Russell's race and the fact that she had filed charges with EEOC. The Court finds that defendant's action was not based on any deficiency in Russell's performance but was initiated as retaliation by the defendant. In harassing and intimidating Russell and in discharging her on January 24, 1975, defendant violated §703(a) and §704(a) of Title VII. Sherrill v. J. P. Stevens &

Co., supra; Calcote v. Texas Educational Foundation, supra.

13. Helen Moore was employed by defendant in 1973 as Manager of the Cafeteria. She complained that she was not accorded the same status as the Managers of the Departments or pay grade. Moore was initially assigned a pay grade 10. The Bank had historically treated the Cafeteria as a part of Personnel. The limited number of employees in the Cafeteria and its volume of sales did not warrant, according to the Bank, a separate departmental status. In any event, there was no difference in treatment by the Bank of Moore and her white predecessor McDaniels. Both were accorded the same status and pay grade.^{17/} McDaniels had 12 years of

^{17/} As with intervenor Cooper and Morgan, see paragraph 7, supra, there was no evidence demonstrating that a college

experience in the position, although she was only a high school graduate. The position was later re-evaluated upward to pay grade 11. No additional duties, however, were added to the position after Moore's employment. Moore and McDaniels performed the same duties. Moore has, therefore, failed to demonstrate that she was treated differently in her status as Cafeteria Manager and in her initial pay grade because of her race. Wright v. National Archives & Records Service, 609 F.2d 702 (4th Cir. 1979).

15. Moore also alleged that she and other black employees in the Cafeteria were subjected to disparaging remarks and threats because of their race. The evidence, however, fails to support these

17/ continued

degree, as opposed to experience, was more relevant for this particular job.

contentions.^{18/}

16. Elmore Hannah alleged that he was denied a promotion from grade 3 and discriminatorily ordered to transfer to a night shift. Hannah, however, was employed under the Bank's program for the handicapped. He has a serious speech defect and coordination problem. He failed to demonstrate that he was qualified or able to perform the job positions he requested. The evidence also fails to establish that he was denied rights under Title VII in being directed to work the night shift. Because of business needs, the Bank reduced the number of cleaners on Hannah's day shift. Hannah was selected for the night shift because he would be able to perform

^{18/} The evidence was in sharp dispute. The Court, after reviewing the testimony of the parties, resolves this conflict in defendant's favor.

those duties rather than the more demanding ones remaining on the day shift. Hannah contended that he was more senior to two black employees who remained on the day shift, that the night shift would conflict with his night classes^{19/} and that he was selected for the night shift because he had complained about the Bank's racial practices. The evidence, however, fails to support Hannah's assertions.

17. Black employees assigned to pay grades 4 and 5 have, during the relevant time period, been retained in these grades for longer periods than comparable white employees and passed over for promotion solely because of their race and color. Using two statistical methods, plaintiffs

^{19/} Hannah, however, was not then enrolled in a class and had not been for several months before the reassignment.

demonstrated disparate treatment by defendant of black employees in these grades, that black employees have been retained in these grades for significantly longer periods even when their relative qualifications are equal to white employees and that the disparate treatment is statistically significant at the 5 percent level.

18. Plaintiffs' statistics also demonstrate statistically significant disparate impact of defendant's promotion practices of black employees from grades 4 and 5.

19. Defendant's exhibits and statistical analyses support plaintiffs' evidence with respect to these pay grades. The oral testimony of class members offers further support.

20. Plaintiffs' evidence, therefore, established a prima facie case that black employees in pay grades 4 and 5 have been

denied promotions from these grades solely because of their race. United States v. Commonwealth of Virginia, supra; Sledge v. J. P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978).

21. Faced with plaintiffs' prima facie case, defendant offered no explanation for its unfavorable treatment of black employees in pay grades 4 and 5. The Court, therefore, concludes, based on all of the evidence of record, that black employees who have been assigned to pay grades 4 and 5 between 1974 and the date of trial have been deprived of rights under Title VII.

22. Having found a pattern and practice of discrimination against black employees in pay grades 4 and 5 and discrimination against intervenors Cooper and Russell, the Court must now devise appropriate remedies. The remedies should, so

far as possible, place the intervenors and members of the class in the positions they would have occupied but for the Bank's discriminatory practices. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421-22 (1975):

It follows that, given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

Franks v. Bowman Transportation Co., 424 U.S. 747, 763, 771 (1976):

To effectuate... [the] "make whole" objective, Congress in §706(g) [42 U.S.C. §2000e-5(g)] vested broad equitable discretion in the federal courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay..., or any other equitable relief as the Court deems appropriate"....

No less than the denial of the remedy of back pay, the denial of seniority [and other equitable] relief [including reinstatement and promotion] to

victims of illegal racial discrimination ... is permissible only for reasons which, if applied generally, would not frustrate the central purpose of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."

23. Intervenor Cooper and Russell and members of the class have sustained losses of pay as a result of the defendant discriminatory practices. They are entitled to be made whole, including adjustments in fringe benefits, and the Court knows of no reason to deny back pay relief in this case. Albermarle Paper Co. v. Moody, supra. Because vacancies may not be readily available, Cooper and Russell and members of the class may also be entitled to front pay -- future pay at the rate of the positions they were wrongfully denied -- until they are placed in a job of equal or higher pay. Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976).

24. Cooper and Russell and members of the class are also entitled to injunctive relief. The defendant should be enjoined to reinstate intervenors Cooper and Russell in their employment with the Bank in job positions comparable to the jobs they held prior to their discharge and to promote them to the job positions and pay grades they would have held in the absence of defendant's discriminatory practices. The class is entitled to an injunction prohibiting the defendant from discriminating in its promotion practices against black employees in pay grades 4 and 5 and from continuing any other racially discriminatory employment practices in violation of §703(a) and §704(a) of Title VII. Franks v. Bowman Transportation Co., supra; Barnett v. W. T. Grant Co., 518 F.2d 543 (4th Cir. 1975).

25. Class members who have been

denied promotions from grades 4 and 5 because of their race are entitled to be placed in their rightful job positions at the first appropriate vacancy Franks v. Bowman Transportation Co., supra. "Bumping" or displacement of incumbent employees is not permissible. Patterson v. American Tobacco Co., supra; Sledge v. J. P. Stevens & Co., supra. Rather, class members will be awarded front pay until vacancies occur in the job positions they should have occupied.

26. Since the Court has found that Cooper, Russell and members of the class have sustained monetary losses because of defendant's discriminatory practices, the Court will appoint a Master with appropriate instructions to receive evidence and to make recommendations with respect to the back pay they should receive. With the finding of class discrimination, class

members are presumptively entitled to back and front pay based on the difference between what they have earned and what they would have earned but for defendant's discriminatory practices, together with adjustments in fringe benefits and with interest. In order to demonstrate individual entitlement, class members need only show that they are members of the class who actively sought or would have sought ^{20/} promotion out of grades 4 and 5 and provide information regarding their loss of earnings. Teamsters, supra at 361-71; Sledge v. J. P. Stevens & Co., supra at 637-38.

27. The Court concludes that there

^{20/} Non-applicants have the heavy burden of demonstrating that but for the defendant's discriminatory practice they would have sought such employment, were available and would have accepted higher job positions if they had been promoted. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 367-71 and n.53.

was no showing that the bank had discriminated against black employees with respect to promotions out of grades 6 and above, and that defendant did not violate Title VII or 42 U.S.C. §1981 with respect to promotions out of grade 6 and above.

28. As the prevailing parties, plaintiff and the intervenors are entitled to their costs and expenses. The intervening plaintiffs are also entitled to reasonable attorneys' fees. 42 U.S.C. §2000e-5(k); 42 U.S.C. §1981. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

This 29th day of May, 1981.

/s/James B. McMillan
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

SYLVIA COOPER, et al.

Intervening-Plaintiffs,

- vs -

FEDERAL RESERVE BANK OF RICHMOND,

Defendant

O R D E R

On March 24, 1981, a motion for leave to intervene was filed by Phyllis Baxter, Brenda Gilliam, Glenda Knott, Alfred Harrison, Emma Ruffin and Sherri McCorkle.

Those intervenors who at times pertinent to the alleged discrimination were in grade 5 or below are in the class as to which relief has been ordered by the

judgment in this case and their rights will be dealt with in Stage II proceedings. No intervention by them appears necessary or appropriate in view of that situation.

Those would be intervenors who at the pertinent times were in grades higher than grade 5 are not entitled under the ruling of the court to be treated as members of the class which has gained rights in this litigation. The court has found no proof of any classwide discrimination above grade 5 and, therefore, they are not entitled to participate in any Stage II proceedings in this case. As to those would be intervenors, their motion to intervene now as individual plaintiffs should be denied. The only authority close in point is Dickerson v. U. S. Steel Corp., 582 F. 2d 827 (3d Cir. 1978), which denied individual intervention because class rights had

previously been denied by the court.

The motion for leave to intervene is denied.

The pendency of this action has apparently tolled the rights of the would be intervenors to file separate individual actions preceded by claims filed with the EEOC as to Title VII rights, and it has also apparently tolled their rights to file suit under 42 U.S.C. §1981.

I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week. More pertinently, since the EEOC is a party to this case and seems to have an active interest in seeing that the claims of the four intervenors are pursued, I see no reason why all formalities of processing

the claim and the subsequent proceedings of conciliation and mediation could not be accomplished in very short order, like two weeks or less, so that this whole question could become moot in a few weeks.

All motions for leave to intervene are thus denied without prejudice to any underlying rights the intervenors may have.

IT IS SO ORDERED, this 28th day of May, 1981.

James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-81-195

=====

PHYLLIS BAXTER, BRENDA GILLIAM,
GLENDA KNOTTS, ALFRED HARRISON
AND SHERRI McCORKKE,

Plaintiff,

- vs -

FEDERAL RESERVE BANK OF RICHMOND,

Defendant

O R D E R

:

Several motions presently pending are
decided as follows:

1. The motion of the defendant to
dismiss is denied.

2. The court intends to decide the
merits of the claims and appropriate
relief, if any, for those claims.

3. The related case, C-C-77-082,
Equal Employment Opportunity Commission and

Sylvia Cooper, et al. v. Federal Reserve Bank of Richmond, is on appeal to the Fourth Circuit Court of Appeals from a judgment entered in this case on May 29, 1981. I see no reason to try this case until that appeal has been determined, because that appeal might decide some questions pertinent to this case.

4. If the Cooper case has to be re-tried on any point, I will consolidate this case and the Cooper case for the trial of any common issues.

5. No further action will be required of the parties in this case until the appeal in Cooper has been decided.

6. I certify that the issues disposed of by this Order involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the

termination of the litigation.

IT IS SO ORDERED, this 25th day of
February, 1982.

James B. McMillan
United States District Judge

No. 83-185

Office - Supreme Court, U.S.

FILED

DEC 19 1983

ALEXANDER L. STEVAS.

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

PHYLLIS BAXTER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

PETITION FOR WRIT OF CERTIORARI FILED AUGUST 4, 1983
CERTIORARI GRANTED OCTOBER 31, 1983

J. LEVONNE CHAMBERS

JOHN NOCKLEBY

CHAMBERS, FERGUSON, WATT,

WALLAS, ADKINS & FULLER, P.A.

Suite 730

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GEORGE R. HODGES*

Moore and Allen

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16th Floor

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New York, New York 10013

(212) 219-1900

Counsel for Petitioners

* Counsel of Record

IN THE
SUPREME COURT OF THE UNITED STATES
No. 83-185

=====

SYLVIA COOPER, et al.,
 Petitioners,
 v.
FEDERAL RESERVE BANK OF RICHMOND

=====

PHYLLIS BAXTER, et al.,
 Petitioners,
 v.
FEDERAL RESERVE BANK OF RICHMOND

=====

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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JOINT APPENDIX

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Motion for Leave to Intervene and File Complaint-in-Intervention, filed March 23, 1981	39a
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Relevant Docket Entries

Cooper et al. v. Federal Reserve Bank

<u>Date</u>	<u>Entry</u>
March 22, 1977	Complaint
April 21, 1977	Motion to intervene by Sylvia Cooper, Constance Russell, Helen Moore and Elmore Hannah, Jr., w/CS- Filed and proposed complaint in intervention
September 26, 1977	Order allowing intervention (JBM) - Sylvia Cooper, Constance Russell, Helen Moore and Elmore Hannah allowed to intervene as plaintiffs. Copies to Counsel.
April 26, 1978	Consent Order that (1) plaintiffs-intervenors are certified to represent a class pursuant to FRCP Rule 23(a), (b)(2) and (b)(3). * * * (5) attached notice approved * * *
October 30, 1980	Memorandum of Decision - JBM

February 27, 1981

Defendant's Response to
Plaintiffs' Proposed
Findings of Fact and Con-
clusions of Law

March 24, 1981

Motion for Leave to Inter-
vene and To file Complaint-
In-Intervention by Phyllis
Baxter, Brenda Gilliam,
Glenda Knott, Alfred
Harrison, Emma Ruffin and
Sherri McCorkle

May 29, 1981

Order (JBM) -- all motions
for leave to intervene are
thus denied without prej-
udice to any underlying
rights the intervenors may
have

May 29, 1981

Findings of Fact and Con-
clusions of Law (JBM)....

May 29, 1981

Judgment (JBM)....

June 10, 1981

Notice of Appeal by
Defendant.

Relevant Docket Entries
Baxter, et al. v. Federal Reserve Bank

<u>1981</u>	#1	COMPLAINT and MOTION FOR CONSOLIDATION OF PROCEEDINGS [C-C-77-82].
	#2	MOTION FOR CONSOLIDATION OF PROCEEDINGS. Summons Issued - Original summons w/copy, copy ea of COMPLAINT and MOTION handed to USM for serv. JS 5 Issued.
05-21	#3	SUMMONS w/Marshal's Return - served FEDERAL RESERVE BANK OF RICHMOND w/Summons, Complaint & Motion by CM on 5-14-81.
06-04	#4	RESPONSE to Motion for Consolidation, by defendant.
06-04	#5	ANSWER to defendant with Jury Trial Demand.
07-02	#6	MOTION TO DISMISS, by defendant.
07-13	#7	RESPONSE to Defendant's Motion to Dismiss, by pl[aintiffs].
7-30		Placed on <u>August, 1981 MOTIONS CALENDAR</u>
7-30	#8	REPLY to Plaintiffs' Response to Dismiss by defendant

8-14 #9 RESPONSE of EEOC Commission in
Support of Motion for Consoli-
dation

1982

1-20 #10 ORDER-JBM

1. The motion of defendant to dismiss is denied.
2. The court intends to decide the merits of the claims and appropriate relief, if any, for those claims.
3. The related case C-C-77-082 is on appeal and I see no reason to try this case until that appeal has been determined.
4. If the Cooper case is re-tried, I will consolidate this case for the trial of any common issues.
5. No further action will be required of the parties in this case until the appeal in Cooper has been decided.

2-25 #11 MOTION to amend order of Jan. 20,
1982 handed to JBM

2-25 #12 STIPULATION by parties.

2-26 #13 ORDER (JBM)

1. Motion of the defendant to dismiss is denied.

2. The court intends to decide the merits of the claims and appropriate relief, if any, for those claims.
3. The related case C-C-77-82 is on appeal. I see no reason to try this case until that appeal has been determined, because that appeal might decide some questions pertinent to this case.
4. If the Cooper case has to be re-tried on any point I will consolidate this case and the Cooper case for trial of any common issues.
5. No further action will be required of the parties in this case until the appeal in Cooper has been decided.
CC: counsel
6. Certification of interlocutory appeal granted.
CC: counsel

3-29 #15

ORDER (FCCA) - that the joint motion to consolidate this appeal with case 72-82 is denied, but ordered that the clerk arrange to have these cases argued the same day before the same plan FCCA #81012 Certifying record on appeal this date to FCCA w/ltr to counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. CC-77-82

=====

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 451, 1343 and 1345. This is an action authorized and instituted pursuant to Section 706(f)(1) and (3) and (g) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. Section 2000e, et seq.

(Supp. VI, 1976), hereinafter referred to as "Title VII."

2. The unlawful employment employment practices alleged below were and are now being committed within the state of North Carolina and the Western Judicial District of North Carolina.

PARTIES

3. Plaintiff, Equal Employment Opportunity Commission, (hereinafter, the "Commission"), is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII and is expressly authorized to bring this action by Section 706(f)(1), 42 U.S.C. Section 2000e-5(f)(1).

4. Since at least July 2, 1965, Defendant, Federal Reserve Bank of Richmond, (hereinafter, the Bank), has continuously been and is now a Virginia corporation, doing business in the state of North

Carolina and City of Charlotte, where it is engaged in the business of servicing banks within and without the state of North Carolina, and has continuously and does now employ more than fifteen employees.

5. Since at least July 2, 1965, the Company has continuously been and is now an employer engaged in an industry affecting commerce within the meaning Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e-(b), (g) and (h).

STATEMENT OF CLAIM

6. More than thirty (30) days prior to the institution of this lawsuit, a person claiming to be aggrieved filed a charge with the Equal Employment Opportunity Commission alleging violations of Title VII by Defendant. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since at least July 2, 1965, and continuously up until the present time, Defendant Bank has intentionally engaged in unlawful employment practices at its Charlotte facility in violation of Section 703(a) of Title VII. These policies and practices include but are not limited to the following:

- (a) failing and refusing to promote blacks because of race;
- (b) failing and refusing to promote an individual because of her race and sex;
- (c) constructively discharging an individual because of her race and sex.

PRAYER FOR RELIEF

WHEREFORE, The Commission respectfully prays that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, agents, employees, successors, assigns and all persons in active concert or participation

with it from engaging in any employment practice which discriminates because of race and sex.

B. Order Defendant to institute and carry out policies, practices and affirmative action programs which provide equal employment opportunities for blacks and women, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant to make whole those persons adversely affected by the unlawful employment practices described herein, by providing appropriate back pay, with interest, in an amount to be proved at trial and other affirmative relief necessary to eradicate the effects of its unlawful employment practices.

D. Grant such further relief as the Court deems necessary and proper.

E. Award the Commission its costs in this action.

Respectfully submitted,

ABNER W. SIBAL
General Counsel

WILLIAM L. ROBINSON
Associate General Counsel

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
2401 "E" Street, N.W.

/s/
DONALD L. HOLLOWELL
Assistant General Counsel

/s/
JOSEPH RAY TERRY
Supervisory Trial Attorney

/s/
BEVERLY G. AGRE
Senior Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
ATLANTA REGIONAL OFFICE OF THE
GENERAL COUNSEL
1389 Peachtree Street, N.E.
Atlanta, Georgia 30309
Phone: 404/881-2171

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. CC-77-82

=====

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

and

SYLVIA COOPER, CONSTANCE RUSSELL,
HELEN MOORE and ELMORE HANNAH, JR.,

Applicants in Intervention,

v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

COMPLAINT IN INTERVENTION

1. Intervenors hereby adopt and
reallege paragraphs 1-7 of the original
complaint.

2. Intervenor further invoke the jurisdiction of the Court pursuant to 42 U.S.C. § 2000e-5(g)(1) and further allege that defendant's employment practices violate 42 U.S.C. § 1981.

3. Intervenor are black citizens of the United States who reside in Mecklenburg County, North Carolina.

(a) Intervenor Sylvia Cooper was initially employed by the defendant at its Charlotte facilities in 1968. During her employment, she was discriminated against in promotions, wages, job assignments and other terms and conditions of employment and forced to terminate her employment on June 16, 1975, because of her race, color and sex.

(b) Intervenor Constance Russell was employed by the defendant on October 19, 1971, at its Charlotte

facilities. During her employment, she was discriminated against in promotions, wages, job assignments and other terms and conditions of employment and discharged on January 24, 1975, because of her race, color and sex.

(c) Intervenor Helen Moore was employed by the defendant in October, 1973, at its Charlotte facilities. During her employment, she has been and is continuing to be discriminated against in promotions, wages, job assignments and other terms and conditions of employment because of her race, color and sex. She is still employed by the defendant.

(d) Intervenor Elmore Hannah, Jr., was employed by the defendant in May, 1973. During his employment, he has been discriminated against in

promotions, wages, job assignments and other terms and conditions of employment and was discharged on March 13, 1976, because of his race and color and because he had complained about defendant's racially discriminatory practices.

4. (a) Intervenorors bring this action as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class that intervenors seek to represent is composed of all black and female employees who have worked with the defendant at any time since July 2, 1965, and who have been adversely affected in their employment opportunities because of defendant's practices of discriminating against black and female employees because of their race, color and sex.

(b) The class consists of more than 50 past and present employees who have been, are presently or may in the future be adversely affected by the policies and practices of the defendant complained of herein. The class is so numerous that joinder of all members is impracticable.

(c) The policies and practices of the defendant deny, limit and restrict the employment opportunities of the intervenors and their class, limit and restrict their promotional opportunities and their employment options, subject them to discharge and termination, exclude them from employment and otherwise discriminate against them on the basis of their race, color and sex. The question of law and fact presented by these claims are common to the named intervenors

and the class they seek to represent. The claims of the named intervenors are typical of the claims of the class.

(d) Intervenors are adequate representatives of the class because they have suffered and are continuing to suffer as a result of the defendant's discriminatory practices and wishes to prosecute this action to pursue their legal rights and to insure that all blacks and females in their class are accorded equal employment opportunities as provided by Title VII and 42 U.S.C. § 1981, free of discrimination based on race, color or sex. Additionally, intervenor's counsel have extensive experience in the field of employment discrimination litigation, including class actions and are capable of prosecuting this

action on behalf of the intervenors and their class.

5. The defendant has followed and is presently following a pattern and practice of denying, limiting and restricting the employment opportunities of black and female employees solely of their race, color and sex. These practices are implemented in the following ways:

(a) Black and female employees are considered only for limited job positions with the defendant and are denied positions reserved for white or male employees;

(b) Black and female employees are discriminatorily denied promotions and consideration for promotion to positions limited to white or male employees;

(c) Black and female employees are discriminatorily denied equal

wages, or positions with higher wages and responsibilities and other fringe benefits;

(d) Black and female employees are disciplined in a discriminatory manner and are discriminatorily denied equal conditions, terms and benefits of employment;

(e) Black and female employees are discriminatorily discharged, and intimidated and harassed when they complained about or seek redress from defendant's discriminatory practices;

(f) Intervenors were employed by the defendant and limited in and denied equal employment opportunities pursuant to defendant's employment practices described above;

(g) Intervenor Cooper was constructively discharged and the employment of intervenors Russell and

Hannah was terminated by defendant because of their race and sex and because they had complained about defendant's discriminatory employment practices;

(h) Intervenors and their class have suffered and are continuing to suffer substantial economic losses in wages because of defendant's discriminatory employment practices.

6. Each of the intervenors has timely filed charges of employment discrimination against the defendant with the Equal Employment Opportunity Commission. The Commission has instituted this proceeding pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e et seq. The intervenors are entitled to intervene in the proceeding pursuant to the Act. They have no other adequate or complete remedy.

WHEREFORE, the intervening plaintiffs respectfully pray:

1. That this action be certified as a class action pursuant to Rule 23(c) of the Federal Rules of Civil Procedure as a Rule 23(a), (b)(2) class action proceeding;

2. That a preliminary and permanent injunction be issued, enjoining the defendant, its agents, successors, employees, attorneys, servants and all persons in active concert or participation with them from continuing any employment practices or policies which discriminate against the intervenors and members of their class because of their race, color and/or sex;

3. That a preliminary and permanent injunction be issued, enjoining the defendant, its agents,

successors, employees, attorneys, servants and all persons in active concert or participation with them to reinstate intervenors Cooper, Russell and Hannah and others of their class and to place the intervenors and their class in job positions they would have enjoyed but for the defendant's discriminatory actions and practices;

4. That the intervenors and their class be awarded back pay and front pay, continuing until the intervenors and their class have been placed in job positions they would have occupied in the absence of defendant's discriminatory practices and policies;

5. That the intervenors and their class be awarded their costs, expenses and reasonable attorney fees; and

6. That the intervenors and their class be awarded such farther, additional or alternative relief as may be necessary in order to grant them the full and proper relief to which they are entitled under Title VII and 42 U.S.C § 1981.

This the 20th day of April, 1977.

Respectfully submitted,

/s/ J. LeVonne Chambers, Esq.

J. LEVONNE CHAMBERS
Chambers, Stein, Ferguson &
Becton, P.A.
Suite 730 East Independence
Plaza
Charlotte, North Carolina
28202

Attorney for Applicants in
Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. CC-77-82

=====

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

and

SYLVIA COOPER, et al.,

Intervening Plaintiffs,

v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

CONSENT ORDER

This matter is before the Court on the defendant's motion to certify this action as a class action and to designate the class.

This is an employment discrimination action. It was brought by the Equal Employment Opportunity Commission ("EEOC") on March 22, 1977, pursuant to Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(f) (1). The defendant is the Charlotte Branch Office of the Federal Reserve Bank of Richmond. The EEOC alleged in its Complaint that the defendant had discriminated against black persons in general in promotions; and had discriminated against an individual on account of her race and sex in denial of promotion and in constructive discharge. The EEOC's Complaint does not state any general allegation of sex discrimination, nor does it seek relief for any other person on account of sex discrimination. By order dated September 21, 1977, four black present or former employees of the defendant (three of which are

females) were allowed to intervene in this action. The intervenors alleged discrimination on account of race (and sex in the case of the three females), in promotions, wages, job assignments and terms and conditions of employment. The intervenors sought to represent a class of all blacks and females who worked for the defendant at any time since July 2, 1965. The defendant answered the Complaint in Intervention and denied the material allegations thereof.

The plaintiff-intervenors and the defendant have agreed upon a designation of the class to include all black persons who worked for the defendant at any time since January 3, 1974. The plaintiff-intervenors no longer seek to raise in this action any issues of sex discrimination.

The plaintiff and the defendant have agreed that the plaintiff's Complaint

states claims only as to the promotion of blacks in general and the denial of promotions and the constructive discharge of one individual, Sylvia Cooper, on account of her race and sex. The plaintiff and the defendant have also agreed that the plaintiff seeks relief for race discrimination only for those black persons who worked for the defendant since January 3, 1974; and that the plaintiff seeks relief for sex discrimination only for Sylvia Cooper. The plaintiff and the defendant have also agreed that the plaintiff may offer evidence relevant to sex discrimination in general in support of its claim for Sylvia Cooper, but that it does not seek a finding or ruling on the issue of sex discrimination in general or as to any individual other than Sylvia Cooper.

The Court finds from the pleadings, the evidence produced to date through

discovery and the briefs and arguments of counsel that the number of black employees who might have been or may be affected by the alleged racially discriminatory employment practices is so numerous as to make joinder of all such parties impracticable; that there are common questions of law and fact involved; that the claims and defenses of the individual plaintiff-intervenors are typical of the claims and defenses of the class which they seek to represent; that the plaintiff-intervenors will fairly and adequately protect the interest of the class they seek to represent; that the defendant has allegedly acted or refused to act on grounds generally applicable to the class thereby making appropriate final and injunctive or declaratory relief with respect to the class as a whole; and that the questions of law or fact common to the members of the class predominate over any

questions affecting only individual members and that class representation by the plaintiff-intervenors is superior to other available methods for the fair and efficient adjudication of the controversy.

For the foregoing reasons, the Court concludes that it is appropriate for the plaintiff-intervenors to represent a class pursuant to FRCP Rule 23(a), (b)(2) and (b)(3); that the class so certified shall include all black persons who worked for the defendant at any time since January 3, 1974; that the class members shall be notified of the pendency of this action; and that the designation of the class shall determine the scope of those persons represented by the plaintiff-intervenors. The Court further concludes that the persons for whom the plaintiff shall seek relief for race discrimination include all black persons who worked for the

defendant at any time since January 3, 1974; and that the persons for whom the plaintiff shall seek relief for sex discrimination includes only Sylvia Cooper.

IT IS THEREFORE ORDERED THAT:

1. The plaintiff-intervenors are certified to represent a class pursuant to FRCP Rule 23(a), (b)(2) and (b)(3).

2. The class of persons represented by the plaintiff-intervenors shall include all black persons who worked for the Federal Reserve Bank of Richmond at its Charlotte Branch Office at any time since January 3, 1974.

3. Notices of the pendency of this action shall be mailed certified mail, return receipt requested, to the last known address of each identifiable class member and published once per week for two consecutive weeks in the Charlotte Observer. Such notice shall be initiated within

30 days after the entry of this Order.

4. The defendant is directed to prepare and administer mailing and publication of the notice. The plaintiff-intervenors shall bear the cost of publication and certified mailing.

5. The attached notice is approved.

6. The persons for whom the plaintiff shall seek relief for race discrimination include all black persons who were employed by the defendant at any time since January 3, 1974; and the person for whom the plaintiff shall seek relief for sex discrimination includes only Sylvia Cooper.

7. Pursuant to FRCP Rule 23(c)(2), the class certification is conditional and may be altered or amended before a final decision on the merits.

This the 25 day of April, 1978.

/s/
James B. McMillan
United States District Judge

CONSENTED TO:

MOORE AND VAN ALLEN
3000 NCNB Plaza
Charlotte, North Carolina 28280
704/374-1300

CHAMBERS, STEIN,
FERGUSON & BECTON
951 S. Independence
Boulevard
Charlotte, North
Carolina 28202
704/375-8461

By: /s/
Attorneys for
Defendant

By: /s/
Attorneys for Inter-
venors

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1389 Peachtree St., N.E.
Suite 101
Atlanta, Georgia 30309

By: /s/
Atlanta Regional
Office of the
General Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. CC-77-82

=====

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

and

SYLVIA COOPER, et al.,

Intervening Plaintiffs,

v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

MOTICE OF PENDENCY
OF CLASS ACTION

PLEASE READ CAREFULLY. THIS MAY AFFECT YOUR
RIGHTS

NOTICE IS HEREBY GIVEN THAT:

1. A case entitled Equal Employment

Opportunity Commission v. Federal Reserve Bank of Richmond, Civil Action No. C-C-72-82, was filed in the United States District Court in Charlotte, North Carolina on March 22, 1977. By order dated September 21, 1977, certain black present and former employees of the defendant were allowed to intervene in the action. The plaintiff and the plaintiff-intervenors have alleged that the defendant has discriminated against blacks in promotions, wages, assignments, and other terms and conditions of employment. The defendant has denied and continues to deny these allegations.

2. Pursuant to an Order of this court, this notice is being published in order to inform interested parties of the pendency of this action, the certification of the plaintiff-intervenors to represent a class and the definition of that class and those persons for whom the plaintiff-inter-

venors may seek relief.

3. The class of persons who are entitled to participate in this action as members of the class represented by the plaintiff-intervenors, for whom relief may be sought in this action by the plaintiff-intervenors and who will be bound by the determination in this action is defined to include: all black persons who were employed by the Federal Reserve Bank of Richmond at its Charlotte Branch Office at any time since January 3, 1974.

4. If you fit in the definition of the class in paragraph 3 you are a class member. As a class member, you are entitled to pursue in this action any claim of racial discrimination in employment that you may have against the defendant. You need to do nothing further at this time to remain a member of the class. However, if you so desire, you may exclude yourself

from the class by notifying the Clerk, United States District Court, as provided in paragraph 6 below.

5. If you decide to remain in this action, you should be advised that: the court will include you in the class in this action unless you request to be excluded from the class in writing; the judgment in this case, whether favorable or unfavorable to the plaintiff and the plaintiff-intervenors, will include all members of the class; all class members will be bound by the judgment or other determination of this action; and if you do not request exclusion, you may appear at the hearings and trial of this action through the attorney of your choice.

6. If you desire to exclude yourself from this action, you will not be bound by any judgment or other determination in this action and you will not be able to depend

on this action to toll any statutes of limitations on any individual claims you you may have against the defendant. You may exclude yourself from this action by notifying the Clerk in writing that you do not desire to participate in this action. The Clerk's address is: Clerk, United States District Court, Post Office Box 1266, Charlotte, North Carolina 28232.

7. The plaintiff-intervenors are represented by J. LeVonne Chambers, Esq. Chambers, Stein, Ferguson & Becton, Suite 730, East Independence Plaza, 951 Independence Blvd., Charlotte, North Carolina 28202 (704) 375-8461. The plaintiff is represented by LaVerne S. Tisdale, Esq., Equal Employment Opportunity Commission, 1389 Peachtree Street, N.E., Atlanta, Georgia 30309, (404) 881-2176.

This the 25 day of April, 1978.

/s/

James B. McMillan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. CC-77-82

=====

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

and

SYLVIA COOPER, et al.,

Intervening Plaintiffs,

and

PHYLLIS DAXTER, BRENDA GILLIAM,
GLENDA KNOTT, EMMA RUFFIN, ALFRED
HARRISON and SHERRI McCORKLE,

Additional Applicants for
Intervention as Plaintiffs,

v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

MOTION FOR LEAVE TO INTERVENE AND
TO FILE COMPLAINT-IN-INTERVENTION

Phyllis Baxter, Brenda Gilliam, Glenda Knott, Alfred Harrison, Emma Ruffin and Sherri McCorkle, by their undersigned counsel, respectfully move the Court for leave to intervene in the above-styled action and to file their attached complaint-in-intervention. In support of their motion, the movants show the Court the following:

1. This action was filed by plaintiff Equal Employment Opportunity Commission (EEOC) on March 22, 1977, alleging that the defendant discriminated against black employees at its Charlotte, North Carolina Branch in violation of Title VII, 42 U.S.C. § 2000e et seq.

2. Sylvia Cooper, Constance Russell, Helen Moore and Elmore Hannah, present and former black employees of defendant, were allowed to intervene on September 21, 1977.

3. Plaintiffs requested that the Court certify the action as a class action. The Court certified the action as to the intervenors pursuant to Rule 23(b)(2) and (3) and defined the class as all black employees of defendant at its Charlotte Branch office, who, at any time since January 3, 1974, have been discriminated against and denied equal employment opportunities by the Bank because of their race or color. The movants were within the class as initially defined by the Court and have been subjected to racially discriminatory employment practices by the Bank during the period designated by the Court.

4. The movants testified at the trial of this action and the Court, by Memorandum of Decision of October 29, 1980, indicated that it would rule that discrimination has been established as to the class only with respect to employees who were

employed in pay grades 4 and 5 during the relevant time period. Of the movants, only Ruffin and Harrison will be in the class for whom the Court has directed relief. The other movants have individual claims and wish to pursue their claims and to seek relief at the stage II proceedings directed by the Court.

5. The movants desire to protect their interests and entitlement to relief in this action and should be allowed to intervene for the following reasons:

- (a) The intervening plaintiffs timely filed charges of discrimination with the Equal Employment Opportunity Commission.
- (b) The additional applicants for intervention have been and will continue to be adversely affected by the

racially discriminatory practices of the Bank as found by the Court in its Memorandum Order and by the relief indicated in the Memorandum.

- (c) The additional applicants for intervention wish to pursue their claims for relief with respect to the same transaction, occurrence or series of transactions or occurrences complained of by the original plaintiff and intervenors. The claims of the additional applicants for intervention and of the original plaintiff and intervenors raise common questions of law and fact.

- (d) The additional applicants for intervention have substantial interest in the subject matter of this action.
- (e) The additional applicants for intervention may be bound by any judgment in this action relating to the elimination of racially discriminatory employment practices by the Bank and by the relief which may be directed by the Court.
- (f) Intervention will not delay or prejudice the adjudication of the rights of the original parties to the proceeding. All evidence pertaining to movants'

claims was produced at trial, except the additional evidence to be produced by all parties at stage II of this proceeding.

WHEREFORE, the additional applicants for intervention respectfully pray that they be allowed to intervene in this proceeding as parties plaintiff and that they be allowed to file the attached Complaint-In-Intervention.

This 23rd day of March, 1981.

Respectfully submitted,

/s/ _____

J LEVONNE CHAMBERS
Chambers, Ferguson, Watt,
Wallas, Adkins & Fuller, P.A.
Suite 730 East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202
704/375-8461

Attorney for Intervening Plain-
tiffs and Additional Applicants
for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. CC-77-82

=====

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

and

SYLVIA COOPER, et al.,

Intervening Plaintiffs,

and

PHYLLIS BAXTER, BRENDA GILLIAM,
GLENDA KNOTT, EMMA RUFFIN, ALFRED
HARRISON and SHERRI McCORKLE,

Additional Applicants for
Intervention as Plaintiffs,

v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

COMPLAINT-IN-INTERVENTION

1. Intervenors hereby adopt and re-

allege paragraphs 1-6 of the original intervenors' Complaint-in-Intervention and prayer for relief.

2. Intervenor Phyllis Baxter, Branda Gilliam, Glenda Knott, Alfred Harrison, Emma Ruffin and Sherri McCorkle are black citizens of the United States. The intervenors reside in Mecklenburg County, North Carolina.

3. Intervenor were employed by defendant at its Charlotte Branch and were subject to discriminatory employment practices by the Bank pursuant to the same policies and practices as alleged in the original complaint.

(a) Intervenor Baxter was employed by the Bank on October 5, 1970, as a grade 5 accounting clerk. She promoted to a grade 6 reconcilement clerk in May 1971. Between 1975 and 1978, she applied for several

positions which would have enabled her to promote to higher job positions. She was denied the job positions she requested because of her race and color.

(b) Intervenor Gilliam was employed by the Bank on January 30, 1973, as a grade 4 clerk. She promoted to grade 5 on July 29, 1974. She applied for a junior computer console position in November, 1976, and was denied the position because of her race.

(c) Intervenor Knott was employed by the Bank on April 20, 1970. She had previously been employed by the Federal Reserve System in Washington as a grade 9 employee. She started with the Bank as a grade 5 and is now a grade 9. Despite her training and job performance, she has

continuously been denied promotion to supervisory positions and to management because of her race.

(d) Intervenor Harrison was employed by the Bank as a grade 3 employee in 1975. He tried to promote to a guard position in defendant's Security Department and was denied the position because of his race.

(e) Intervenor Ruffin was employed by the Bank on June 5, 1972, as a grade 3 messenger. She promoted to a grade 4 addressograph messenger in 1974, and has continuously been denied promotion out of grade 4 because of her race.

(f) Intervenor McCorkle was employed as a grade 4 employee in November, 1972. She is now a grade 7 employee but has continuously been

denied promotion to a higher grade because of her race.

4. The intervenors have suffered and are continuing to suffer substantial economic losses in wages because of the discriminatory practices of the Bank.

WHEREFORE, the intervening plaintiffs respectfully pray:

1. That the Court issue a declaratory judgment holding that the acts and practices of the Bank as complained of herein are violative of Title VII and 42 U..C. §1981.

2. That the Court issue a permanent injunction, enjoining the discriminatory practices of the Bank.

3. That the Court order such affirmative relief for the intervenors so as to place them in the job positions they would have occupied but for the Bank's racially discriminatory practices.

4. That the Court award the intervenors back pay and front pay until they are placed in their rightful positions.

5. That the Court award the intervenors their costs, expenses and reasonable attorney fees and such other relief to which they may be entitled under Title VII and 42 U.S.C. § 1981.

6. That the Court grant the relief as prayed for by the original plaintiffs.

This 23rd Day of March, 1981.

Respectfully submitted,

/s/

J. LEVONNE CHAMBERS

Chambers, Ferguson, Watt,
Wallas, Adkins & Fuller, P.A.
Suite 703 East Independence Plaza
951 South Independence Boulevard
Charlotte, North Carolina 28202
704/375-8461

Attorney for Intervening Plaintiffs and Additional Applicants for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. CC-77-82

=====

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

and

SYLVIA COOPER, et al,

Intervening Plaintiffs,
v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

JUDGMENT

Based on the Findings of Fact and
Conclusions of Law previously filed herein,
the Court enters the following Judgment.
This Judgment is limited to the branch
facilities of the defendant in Charlotte,
North Carolina.

IT IS HEREBY ORDERED, ADJUDGED AND
DECREED:

1. This action is certified as a class action under Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure. The class is defined as follows:

All black employees who were employed by the defendant Federal Reserve Bank of Richmond (hereinafter referred to as "the Bank") at its Charlotte, North Carolina facilities at any time between January 3, 1974, and September 8, 1980, and who have been discriminated against because of their race in promotions, training, wages, discipline and discharge.

The Court will hereafter enter a separate order requiring that an appropriate notice be served on all class members.

2. The Bank is directed to post a copy of this Judgment in each of its Departments within ten (10) days from the date of this Judgment. The Judgment shall remain posted for sixty (60) days. The

Bank shall also publish a copy of this Judgment in the next issue of Southern Accent, following the date of this Judgment. The Bank shall certify to the Court within fifteen (15) days following the last publication provided for herein that it has complied with the provisions of this paragraph.

3. The Bank shall reinstate Intervenor Sylvia Cooper and Constance Russell, within thirty (30) days following the date of this Judgment, in job positions and pay grades comparable to those they held prior to the termination of their employment. The Bank shall also promote Cooper and Ruseell to the supervisory positions they had requested at the next vacancies in their positions. The Bank, its agents, servants and employees and all persons acting in concert or participation with them are specifically enjoined not to

discriminate against or to harass or intimidate Cooper or Russell because of their race or because of their participation in this proceeding or other efforts to enforce their rights under Title VII.

4. The Bank shall pay back pay to Intervenor Cooper and Russell for any loss of income they have sustained because of the Bank's discriminatory employment practices. Cooper shall be awarded loss of income from the date of John M. Morgan's promotion on February 10, 1975, until the date of her reinstatement as directed in paragraph 3 above. Additionally, Cooper shall be awarded front pay from the date of her reinstatement until she is promoted to the supervisory position she requested or to a higher paying job position, whichever first occurs. Front pay shall be computed as the difference between her pay after reinstatement and the top pay of utility

supervisors in Check Collection. Russell shall be awarded back pay from February 4, 1974, until her reinstatement as directed in paragraph 3 above. Russell's back pay shall be based on the difference between her earnings from February 4, 1974, and what she would have earned from that date as a utility clerk A. Russell shall also be paid front pay from the date of her reinstatement until she is promoted to or assigned as a utility clerk A or to a higher paying job position, whichever first occurs. Cooper and Russell shall also receive adjustments in their fringe benefits based on the salaries they would have received as supervisors and shall be awarded interest on the awards provided for herein, assessed at the proper rate.

5. Members of the class of employees in grade 4 and 5 who were denied promotion or delayed in promotion are entitled to

participate in stage II proceedings in which they are entitled to a presumption that they were discriminated against. They may be awarded back pay from January 5, 1974 until they are or were promoted to job positions they would have held in the absence of discrimination. Class members' entitlement to back pay shall be referred to a Master for recommendations. The Master shall receive evidence from the interested parties and, based on the instructions which shall follow in a separate order, shall make proposed findings and recommendations with respect to any injunctive relief and the amount of back pay together with adjustments in fringe benefits and interest compounded as provided in paragraph 4 above, each class member should receive. The Master shall also receive evidence from the parties regarding back and front pay to be awarded

to Cooper and Russell. The Court has already found that Cooper and Russell are entitled to monetary award. For Cooper and Russell, therefore, the Master shall limit his findings and recommendations to the amount of the awards adjustments in fringe benefits and interest.

6. Within six (6) months from the date of this Judgment and annually thereafter, on or before March 15, during the Court's retention of this action, the Bank shall submit reports to plaintiffs' counsel and to the Court setting forth the following information:

- (1) A list of the name, race, date of hire, department and job position of each employee of the Bank in pay grades 4 and 5.
- (2) A list of the name and race of each employee who has, during the reporting period, promoted or been transferred from pay grades 4 and 5, and the job position and

pay grade to which the employee was promoted or assigned. Job re-evaluations shall be considered a promotion for purposes of this reporting provision if the job is reclassified to a higher pay grade.

- (3) A list by name, race and date of all employees who were discharged or suspended during the reporting period.

7. The Bank shall also advise plaintiffs' counsel and the Court of the date or dates of reinstatement of intervenors Cooper and Russell, the job positions and pay grades to which they are assigned and of any changes, promotions or transfers affecting Cooper and Russell during the reporting period. If a supervisory vacancy develops in the job positions Cooper and Russell have requested and either is not selected for the position, the Bank shall report in detail the reason or reasons why either was not selected for the positions.

8. The Bank shall designate an individual who will be responsible for preparing and submitting the reports provided for in paragraphs 6-7 and for carrying out the provisions of this Judgment. The name and address of the individual shall be given to plaintiffs' counsel and the Court within thirty (30) days of the entry of this Judgment.

9. Plaintiffs are the prevailing parties in this action. The Bank shall pay plaintiffs' costs and shall pay the intervening plaintiffs' reasonable attorney fees, costs and expenses, including expert witness and consultation fees, paralegal time and unusual clerical time for all work performed in this proceeding until the date of this Judgment in accordance with the accompanying Memorandum of Decision as to Fees.

10. Intervenor's counsel shall also receive reasonable attorney fees, costs and expenses, including paralegal time and other proper expenses, for all future work done on behalf of the intervenors and class members (including the individuals named in paragraph 5) for all proceedings in which they prevail before The Master and for work done in the implementation of this Judgment, including fees and expenses for monitoring and examining the various reports required, in answering questions of the class members and in investigating any alleged violations of this Judgment.

11. The action as to Helen Moore and Elmore Hannah shall be dismissed with prejudice. As to the other plaintiffs and class members in grades 4 and 5, however, the Court will retain jurisdiction of the action for two years from the entry of this Judgment. The status of the action will be

reviewed at that time and the action will be dismissed unless the Court finds it necessary to extend the period for retention of the Court's jurisdiction.

This 29 day of May, 1981.

/s/
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. CC-81-195

=====

PHYLLIS BAXTER, BRENDA GILLIAM,
GLENDA KNOTT, EMMA RUFFIN, ALFRED
HARRISON and SHERRI McCORKLE,

Plaintiffs,

v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

COMPLAINT

I.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1343, this being an action seeking enforcement of rights secured to plaintiffs by the Thirteenth Amendment to the Constitution of the United

States and 42 U.S.C. § 1981. As described more fully hereinafter, defendant has denied equal employment opportunities to the plaintiffs solely because of their race and color in violation of 42 U.S.C. § 1981.

II.

Plaintiffs are black citizens of the United States and residents of Mecklenburg County, North Carolina. Plaintiffs are present and former employees of the defendant and worked at defendant's Charlotte, North Carolina branch.

III.

Defendant is a federally chartered corporation with its home office in Richmond, Virginia. Defendant operates a branch facility in Charlotte, North Carolina, where it employs in excess of 300 employees annually. The discriminatory employment practices which plaintiffs seek to challenge herein all occurred at

defendant's Charlotte Branch. Thus, defendant is subject to suit in its corporate name and venue is properly placed with respect to the practices alleged herein, in the United States District Court for the Western District of North Carolina, Charlotte Division.

IV.

Between 1974 and the date of this action, defendant has denied the plaintiffs equal employment opportunities solely because of their race and color. Specifically:

(a) Phyllis Baxter was employed by the defendant on October 5, 1970, as a Grade 5 Accounting Clerk. She promoted to a Grade 6 Reconcilement Clerk in May, 1971. Between 1975 and 1978, she applied for several positions with the Bank which would have constituted a promotion or would have

enabled her to promote to high job positions. She was qualified for the positions, vacancies existed but she was denied the positions because of her race and color.

(b) Brenda Gilliam was employed by the defendant on January 30, 1973, as a Grade 4 Clerk. She promoted to Grade 5 on July 29, 1974, to Grade 6 in 1975 and to Grade 6 in 1977. She applied for a junior Computer console position in November, 1976. She was qualified for the position, a vacancy existed but she was denied the position because of her race and color.

(c) Glenda Knott was employed by the defendant on April 20, 1970. She had previously been employed by the Federal Reserve System in Washington, D.C. as a Grade 9 employee. She was

required to start with defendant as a Grade 5 employee with a substantial cut in pay. She subsequently was allowed to promote to pay Grade 9. Between 1974 and the present, however, she has continuously requested supervisory and management positions. Although qualified for the positions and vacancies existed, she has been denied supervisory and management positions solely because of her race and color.

(d) Alfred Harrison was employed by the defendant as a Grade 3 employee in 1975. He tried to promote to a Guard or Security position. He was qualified for the position, vacancies have existed but he has been denied the position because of his race and color.

(e) Sherri McCorkle was employed by defendant as a Grade 4 employee in November 1972. She has promoted to a Grade 7 job position. She has requested promotions to higher pay grades, was qualified, vacancies existed but she has been denied promotions solely because of her race and color.

Plaintiffs have suffered substantial economic losses because of defendant's racially discriminatory employment practices. Plaintiffs can obtain relief only through this equitable proceeding seeking enforcement of plaintiffs' rights under 42 U.S.C. § 1981.

WHEREFORE, plaintiffs respectfully pray:

1. That the Court issue a declaratory judgment holding that the acts and practices of the defendant as complained of

herein violate plaintiffs' rights under 42 U.S.C. § 1981.

2. That the Court permanently enjoin the defendant from denying equal employment opportunities to the plaintiffs because of their race and color.

3. That the Court order such affirmative relief for the plaintiffs as may be necessary and appropriate to place the plaintiffs in the positions they would otherwise hold but for defendant's racially discriminatory employment practices.

4. That the Court award the plaintiffs back pay and front pay until they are placed in their rightful positions.

5. That the Court award plaintiffs their costs, expenses and reasonable attorney fees and such other relief as may be necessary and appropriate.

This 12th day of May, 1981.

Respectfully submitted,

/s/

J. LEVONNE CHAMBERS

Chambers, Ferguson, Watt,
Wallas, Adkins & Fuller, P.A.
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951 South Independence Boulevard
Charlotte, North Carolina 28202

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No. CC-77-82

=====

PHYLLIS BAXTER, BRENDA GILLIAM,
GLENDA KNOTT, EMMA RUFFIN, ALFRED
HARRISON and SHERRI McCORKLE,

Plaintiffs,

v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

MOTION TO DISMISS

Pursuant to Rule 12 of Federal Rules of Civil Procedure the defendant moves to dismiss the plaintiffs' Complaint. Each of the plaintiffs was a class member in a prior action in which there was an adverse determination regarding their class. Consequently, their claims in this action

are barred by res judicata.

In support of this motion the defendant shows as follows:

I. BACKGROUND

On March 22, 1977, a case entitled Equal Employment Opportunity Commission v. Federal Reserve Bank of Richmond, Civil Action C-C-77-82, was filed in the United States District court in Charlotte, North Carolina. By Order dated September 21, 1977, certain black present and former employees of the defendant were allowed to intervene in the action. Subsequently, on April 26, 1978, the court entered a Order granting the plaintiffs' motion for class certification and conditionally defining the class as follows:

All black employees who were employed by the Federal Reserve Bank of Richmond at its Charlotte Branch office at any time since January 3, 1974 [six months prior to the first charge filed

by the intervenors with the EEOC], who have been discriminated against in promotion, wages, job assignments and terms and conditions of employment because of their race.

A copy of the Notice of Pendency of Class Action which was issued by the Court is attached. Included in the notice was the following language:

3. The class of persons who are entitled to participate in this action as members of the class represented by the plaintiff-intervenors, for whom relief may be sought in this action by the plaintiff-intervenors and who will be bound by the determination in this action defined....

4. ...if you so desire, you may exclude yourself from the class by notifying the Clerk, United States District Court, as provided in paragraph 6 below.

5. If you decide to remain in this action, you should be advised that: the court will include you in the class in this action unless you request to be excluded from the class in writing; the judgment in this case, whether favorable or unfavorable to the plaintiff-intervenors, will include all members of the class; all class members will be bound by the judgment or other determination of this action;....

6. If you desire to exclude yourself from this action, you will not be bound by any judgment or other determination in this action and you will not be able to depend on this action to toll any statutes of limitations on any individual claims that you may have against the defendant....

The class action was tried before the Court in September, 1980. On May 29, 1981, the Court filed a Judgment and a Memorandum of Findings of Fact and Conclusions of Law. The action was certified as a class action under Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure, and the class was defined in the Judgment as follows:

All black employees who were employed by the Defendant Federal Reserve Bank of Richmond at its Charlotte, North Carolina facilities at any time between January 3, 1974, and September 8, 1980, and who have been discriminated against because of their race in promotions, training, wages, discipline and discharge.

The court found that there was discrimina-

tion in the subclass of black employees who were in pay grades 4 and 5. The Court further found that there was no showing that the defendant had discriminated against black employees with respect to promotions out of grade 6 and above.

The plaintiffs in the current action were non-named members of the class in the previous action. They were not in the subclass of employees in pay grades 4 and 5, and consequently, they were not entitled to any relief as a result of the class action. The plaintiffs subsequently filed a motion to intervene as individual plaintiffs in the class action. The motion was denied on May 29, 1981. The plaintiffs have now brought this action alleging the same claims of discrimination by the defendant as were tried in the class action.

II. THE PLAINTIFFS' CLAIMS ARE BARRED
BY RES JUDICATA

The plaintiffs' claims in the present action are barred by the doctrine of res judicata. The well established rule of law is that a judgment or court approved settlement entered in a properly certified class action binds an absent class member. Penson v. Terminal Transport Company, 634 F.2d 989 (5th Cir. 1981); Fowler v. Birmingham News Company, 608 F.2d 1055 (5th Cir. 1979). The purpose of this rule supports the reasons for allowing class actions in the first place. That is, to dispose of the claims of numerous parties in one proceeding. Such a rule allows parties to avoid multitudinous litigation as well as contributes to judicial economy. Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239 (3rd Cir. 1975).

Two cases that are similar to the

present action are Kemp v. Birmingham News Company, 608 F.2d 1049 (5th Cir. 1979) and Fowler v. Birmingham News Company, 608 F.2d 1055 (5th cir. 1979). In each of those cases the plaintiffs brought actions for individual claims against the defendant. At the time of each trial, judgment had been entered in a class action, Cook v. The Birmingham News, CA-73-M- 514 (N.D. Ala. 1975). Judge Johnson of the Fifth Circuit held in both the Kemp and Fowler cases that the individual claims were barred by the previous judgment. A two-pronged test as to whether the judgment in a class action will bind the members of the class was set forth in Kemp as follows:

1. Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class?
and

2. Does it appear after determination of the suit that the class

representative adequately protected the interest of the class? [Kemp, supra, at 1054].

Applying the test to the present factual situation requires that these plaintiffs be bound by the prior, adverse judgment and that the present action be dismissed. There is no question but that the court correctly determine that the representatives would adequately represent the class. The present plaintiffs never objected to their representation. In addition, the record demonstrates that the representatives did in fact protect the interests of the class. Moreover, the plaintiffs in the present action were present at the trial of the class action and actually testified regarding their claims. Under the circumstances, it is difficult to imagine how their interests could have been better represented than

they were. Consequently, the plaintiffs are not entitled to have a second day in court to relitigate issues that have been previously determined in a proceeding which met all due process requirements.

The binding effect of judgments in class actions is augmented by the due process protections incorporated in the criteria and procedures set forth in Rule 23. These protections are the determination by the court of the adequacy of representation and of notice of the proceedings. Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239, 256 (3rd Cir. 1975). There are no allegations in the present Complaint that the plaintiffs were not adequately represented in the class action or that they did not receive adequate notice of their rights regarding avoiding being bound by the judgment by excluding themselves from the class. After

being fully notified of their options and the consequences of each option, each present plaintiff elected to litigate his claims via the class action. Further, they made this decision knowingly since the language in the Notice of Pendency of the class action clearly sets forth that the class members would be bound if they did not opt out.

The only situation our research has disclosed where class members have been permitted to re-litigate their claims as individuals after an adverse ruling in a class action is where there was some failure of the due process protection mechanisms in the class action -- that is, inadequate representation or lack of notice. See, Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973)(inadequate representation); Penson v. Terminal Transport Co., 634 F.2d 989 (5th Cir. 1981)(lack of

notice)); Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979)(lack of notice). Neither such defect is present here, so the present plaintiffs are bound by the judgment in the previous class action.

III. THE PLAINTIFF'S CLAIMS ARE BARRED
BY THE POLICY AND PHILOSOPHY
REGARDING RULE 23

If the plaintiffs in the present case are not barred from filing new suits by the judgment in the prior class action, the purpose and the meaning FRCP of Rule 23 would be negated. The history of Rule 23 demonstrates that Congress did not mean for plaintiffs to have the option of pursuing their claims through a class action and in addition have a right to separate adjudication of individual claims. See Advisory Committee Notes 39 FRD 60, 102; American Pipe and Construction Co. v. Utah, 414 U.S.

538, 38 ..Ed.2d 713, 94 S.Ct. 756 (1974).

Just as the plaintiffs should not have been allowed to intervene in the class action at the late date which they made their motion, they cannot now bring a separate action to litigate the same issues which were considered in the class action. The Court in American Pipe and Construction Co. ably sets forth the law as well as the reasons for the binding effect a judgment in a class action will have on individual claimants:

A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situa-

tion - the potential for so-called "one-way intervention" - aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.

Under the present Rule, a determination whether an action shall be maintained as a class action is made by the Court "[a]s soon as practicable after the commencement of an action brought as a class action...." Rule 23(c)(1). Once it is determined that the action may be maintained as a class action under subdivision (b)(3), the court is mandated to direct to the members of the class "the best notice practicable under the circumstances" advising them that they may be excluded from the class if they so request, that they will be bound by the judgment, whether favorable or not if they do not request exclusion, and that a member who does not request exclusion may enter an appearance in the case. Rule 23(c)(2). Finally, the present Rule provides that in Rule 23(b)(3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion.

Rule 23(c)(3). Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation "as soon as practicable after the commencement" of the action when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. Thereafter they are either nonparties to the suit and ineligible to participate in a recover or to be bound by the judgment or else they are full members who must abide by the final judgment, whether favorable or adverse.

[38 L.Ed.2d at 744 (Emphasis added and footnotes omitted)]

Finally, the only result which supports the logic behind allowing class actions is to dismiss the plaintiffs' Complaint. There is nothing to distinguish these five plaintiffs from any other unsuccessful class members. Therefore, allowing them to proceed here means that a defendant who is completely successful in defending and defeating a class action would nevertheless be subject to further suits brought by each and every individual

included in the class. The latter result is not and should not be the law. The plaintiffs have had their day in court. There was a full and fair trial of their claims and the judgment was adverse to their claims. They are entitled to no more.

WHEREFORE, the defendant prays that the Court enter judgment of dismissal of the plaintiffs' Complaint in its entirety.

Respectfully submitted,

This 1st day of July, 1981.

MOORE AND VAN ALLEN
3000 NCNB Plaza
Charlotte, North Carolina 28280
Telephone: (704) 374-1300

By /s/
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. CC-81-195

=====

PHYLLIS BAXTER, et al.,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

PLAINTIFFS' RESPONSE TO DEFENDANT'S
MOTION TO DISMISS

Defendant has moved to dismiss this proceeding contending (1) that it is barred by res judicata as a result of the judgment entered in EEOC v. Federal Reserve bank of Richmond, ____ F. Supp. ____ (Civ. No. C-C-77-82, March 29, 1981) and (2) that maintenance of this proceeding is inconsistent with the policy and philosophy of Rule

23, Federal Rules of Civil Procedure. Plaintiffs respectfully submit that defendant's motion should be denied.

I.

Plaintiffs' Action Was Instituted Pursuant To The Express Authorization Of The Court

By Order of May 28, 1981, the Court denied plaintiffs' motion to intervene in Civil Number C-C-77-81, stating:

The pendency of this action has apparently tolled the rights of the would be intervenors to file separate individual actions preceded by claims filed with the EEOC as to Title VII rights, and it has also apparently tolled their rights to file suit under 42 U.S.C §1981.

I see no reason, why, if any would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week ...

II.

Plaintiffs' Action Is Not Barred by
Res Judicata

Prior to and at the hearing in No. C-C-77-82, defendant moved that the Court not consider the individual claims of plaintiffs and accept their testimony only as it tended to support the class claim that black employees in plaintiffs' pay grades -- grade 6 and above -- were discriminated against. The Court limited its consideration to plaintiffs' testimony in that respect. Plaintiffs' counsel understood that no determination would be made as to plaintiffs' individual claims. Defendant offered no evidence bearing on the individual claims. Indeed, it was understood that that issue was not being resolved at that stage of the proceeding.

Following the trial, plaintiffs proposed that the Court make findings that

the plaintiffs here had suffered from discriminatory employment practices by defendant or at least hold that their individual claims be referred to the Maaster who was to make proposed findings on relief. Defendant objected and the Court denied plaintiffs' request. As indicated, the Court also denied plaintiffs' motion to intervene in order to pursue their individual claims, since defendant had neither prepared for nor addressed that issue.^{1/}

Res Judicata required:

(1) that the prior judgment must have been rendered by a court of competent jurisdiction; (2) that there must have been a final judgment on the merits; (3) that the parties, or those in privity with them, must be identical in both suits; and (4) that the same cause of action must be involved in both suits.

^{1/} See Defendant's Response to Motion to Intervene of April 6, 1981, p. 3, citing and quoting Dickerson v. United States Steel Corp., 582 F.2d 827 (3d Cir. 1978).

Stevenson v. International Paper Co., 516 F.3d 103, 109 (5th Cir. 1975). (Emphasis added)

The fourth element is missing here.

See Dickerson, supra at 830-831:

The district court's finding of an absence of class-wide discrimination is not necessarily inconsistent with a claim that discrete, isolated instances of discrimination occurred, for which the statistical evidence of a pattern of discrimination may have been lacking; there may have been sufficient evidence to establish a prima facie case of discrimination directed against specific employees. Therefore, the court's decision as to the class-wide claims of discrimination does not, as a matter of res judicata, bar class members from asserting individual claims of personal discrimination. Moreover, not only are the proofs different between class action claims and individual claims of discrimination, but so are the judgments and their binding effect.

See also Patterson v. American Tobacco Co., 535 F.2d 257, 275 n.18 (4th Cir. 1976), cert. den.

If the company discriminates against a black or a woman, it can be called

to account for violating Title VII, regardless of the percentage of blacks and women among its supervisors.

The cases cited by defendant, Penson v. Terminal Transport Company, 634 F.2d 989 (5th Cir. 1981) and Fowler v. Birmingham News Company, 608 F.2d 1055 (5th Cir. 1979), do not require a different result. Both involved prior settlement agreements in proceedings raising the same issues the plaintiffs were seeking to litigate but also relief to the plaintiffs in which they participated.

III.

Maintenance Of These Proceedings Does Not Cause Violence To The Policy and Philosophy Of Rule 23

While Rule 23 is designed to promote convenience to and reduced costs of the parties as well as protection for plaintiffs and defendants, its use is not designed to deprive parties unfairly of

their day in Court. As indicated in Dickerson, supra, class claims and individual claims present separate and distinct issues. Resolution of one does not necessarily foreclose consideration of the other.

For example, in Sledge v. J.P. Stevens & Co., Inc., 585 F.2d 625, 636-638 (4th Cir. 1978), the Court indicated the necessity for considering the two issues separately and in different order. If class liability is established, individual claimants are entitled to certain presumptions of liability. If class liability is not established, individual claims are not foreclosed; rather, individual claimants must proceed without the presumptions of liability that would flow from a determination of class liability. Thus, individual

claims are not foreclosed in either case.^{2/}

For the above reasons, plaintiffs submit that the defendant's motion for dismissal should be denied.

This 10th day of June, 1981.

Respectfully submitted,

/s/

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^{2/} American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974), is not contrary. The Court there considered tolling of the statute of limitations as to class members with the filing of a class claim. The Court did not address the issue presented here whether an adverse determination as to the class, addressing only whether the defined class had been discriminated against, would foreclose an individual claim of a class member specifically excluded from consideration at trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. CC-81-195

=====

PHYLLIS BAXTER, BRENDA GILLIAM,
GLENDA KNOTT, EMMA RUFFIN, ALFRED
HARRISON and SHERRI McCORKLE,

Plaintiffs,

v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

S T I P U L A T I O N

The parties hereby stipulate that:

1. On March 22, 1977, a case entitled Equal Employment Opportunity Commission v. Federal Reserve Bank of Richmond, Civil Action No. C-C-77-082, was filed in the United States District Court in Charlotte, North Carolina. By Order dated

September 21, 1977, certain black present and former employees of the defendant were allowed to intervene in the action as representatives of a class. Subsequently, on April 26, 1978, upon the consent of the parties, the District Court entered an Order conditionally certifying the class in that action and defining the "aggrieved persons" on whose behalf the EEOC could seek relief. A copy of that Order is attached as Exhibit 1.

2. The Court also issued a Notice of Pendency of Class action which is attached as Exhibit 2. That Notice was mailed to class members and published in the Charlotte Observer. Each of the plaintiffs in this action received the Notice.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. CC-81-195

=====

GLENDa KNOTT, EMMA RUFFIN, ALFRED
HARRISON and SHERRI McCORKLE,

Plaintiffs,

v.

FEDERAL RESERVE BANK OF RICHMOND

Defendant.

=====

O R D E R

Several motions presently pending are
decided as follows:

1. The motion of the defendant to
dismiss is denied.

2. The court intends to decide the
merits of the claims and appropriate
relief, if any, for those claims.

3. The related case, C-C-72-082, Equal Employment Opportunity Commission and Sylvia Cooper, et al. v. Federal Reserve Bank of Richmond, is on appeal to the Fourth Circuit Court of Appeals from a judgment entered in this case on May 29, 1981. I see no reason to try this case until that appeal has been determined, because that appeal might decide some questions pertinent to this case.

4. If the Cooper case has to be re-tried on any point, I will consolidate this case and the Cooper case for the trial of any common issues.

5. No further action will be required of the parties in this case until the appeal in Cooper has been decided.

6. I certify that the issues disposed of by this Order involve controlling questions of law as to which there is

substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the termination of the litigation.

IT IS SO ORDERED, this 12th day of February, 1982.

/s/
James B. McMillan
United States District Judge

Office - Supreme Court, U.S.
FILED

OCT 3 1983

No. 83-185

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

SYLVIA COOPER, ET AL.

Petitioners

v.

FEDERAL RESERVE BANK OF RICHMOND,

Respondent

and

PHYLLIS BAXTER, ET AL.

Petitioners

v.

FEDERAL RESERVE BANK OF RICHMOND,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**RESPONDENT'S BRIEF
IN OPPOSITION TO PETITION**

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ABBREVIATIONS

"Petitioner" and "Plaintiff" refer to the EEOC, Cooper, Baxter, et al. collectively

"The Bank" refers to Respondent Federal Reserve Bank

"[page no.] a" refers to the Appendix filed by Petitioners

"FRCP" refers to the Federal Rules of Civil Procedure

"FRAP" refers to the Federal Rules of Appellate Procedure

"*EEOC and Cooper*" refers to the class action, No. 81-1536 below

"*Baxter*" refers to the subsequent individuals' action, No. 82-1259 below.

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STATEMENT OF THE CASE

This is a race discrimination in employment action. It was originally filed by the EEOC in 1976. Several months later Sylvia Cooper and three other individuals intervened as individuals and as representatives of the class of all black employees of the Respondent's Charlotte Branch office (hereafter "the Bank"). The case was certified as a class action. Class members were provided written notice of the class action. That Notice advised them: that they were class members; that they could either proceed as class members or could opt out of the class; and that they would be bound by the determination in the class action, whether favorable or unfavorable, if they did not opt out of the class action. No one involved here sought to opt out of the class or to intervene individually prior to announcement of the District Court's decision.

The Complaint and Complaint-in-Intervention alleged that the Bank had discriminated against the four individuals and against the class of blacks in initial job assignment, training, pay, discipline and promotions in all job Grades (the Bank had job Grades 3 through 16). After extensive discovery, the case was tried to the District Court sitting without a jury in 1980. Shortly after the trial, the District Court issued a "Memorandum of Decision." [191a]. The District Court's Memorandum of Decision concluded that the Bank had discriminated only against two of the four individual claimants (Sylvia Cooper and Constance Russell) and only in promotions out of Grades 4 and 5, but not in other respects. The Memorandum of Decision also directed plaintiffs' counsel to prepare proposed findings of fact and conclusions of law. Plaintiffs' (actually the Intervenor's) counsel prepared and submitted such proposed findings and the Bank filed a response to them. But, the District Court adopted the plaintiffs' proposed findings virtually verbatim.

About four months after entry of the Memorandum of Decision, Phyllis Baxter and several other class members who were not in the part of the class that was awarded relief (*i.e.* blacks in Grades 4 and 5) sought to intervene in the class action. Intervention was denied. Baxter and the others then filed a separate action alleging individual claims of discrimination. The Bank moved to dismiss that action.

The Motion was denied, but the District Court certified the question for interlocutory appeal.

The Bank appealed those portions of the *EEOC and Cooper* judgment that were adverse to it and also appealed the District Court's refusal to dismiss the *Baxter* action. Neither the EEOC nor the private plaintiffs appealed from the portions of the judgment adverse to them.

On appeal, the Fourth Circuit Court of Appeals reversed the District Court's rulings against the Bank in *EEOC and Cooper* and in the *Baxter* action. The Fourth Circuit "disapproved" of the District Court's practice of adopting counsel-prepared findings of fact, but concluded that the District Court's findings in *EEOC and Cooper* were clearly erroneous because they were based on flawed statistical analysis, were not supported by substantial evidence and ignored much evidence in the Record. The Fourth Circuit also reversed the *Baxter* ruling as a matter of law. The private plaintiffs petitioned the Fourth Circuit for rehearing, but rehearing was denied by an equally divided Court. The EEOC did not participate in the petition for rehearing or in this petition.

Petitioners here raise three procedural issues: (I) Whether the class action judgment bars the *Baxter* action; (II) Whether the adoption of counsel-prepared findings is proper; and (III) Whether the Fourth Circuit's decision is consistent with *Pullman-Standard v. Swint*.

RESPONSE TO PETITION FOR CERTIORARI

Summary of Response

I. The Fourth Circuit's decision dismissing the *Baxter* action was a proper application of principles of res judicata and FRCP Rule 23. That decision was consistent with the decisions of other Circuits which have considered the issue.

II. The Fourth Circuit's criticism of the District Court's adoption of counsel-prepared findings is purely a matter of *preference* and did not influence the standard on which those findings were tested. The

Fourth Circuit tested the findings by the "clearly erroneous" standard of FRCP Rule 52(a). In so doing it acted consistently with the directions of this Court and with the other Circuit Courts.

III. The Fourth Circuit's reference to a finding of "ultimate fact" related only to the District Court's Memorandum of Decision which did not purport to be FRCP Rule 52 "findings" at all, and did not relate to the actual "findings of the District Court". So, the decision comports with *Pullman-Standard v. Swint*.

I.

The Fourth Circuit's Decision That Class Members' Subsequent Individual Actions are Barred by the Adverse Class Action Judgment is Consistent with the Rulings of this Court and Other Circuits

The Fourth Circuit held that Petitioners' individual claims in the *Baxter* action were barred by the judgment adverse to their class in the *EEOC and Cooper* class action based upon principles of res judicata and FRCP Rule 23. In that decision, the Fourth Circuit acted consistently with other Circuits by enforcing the binding effect of the class action judgment. The *Baxter* plaintiffs were not denied their day in court, as Petitioners claim. Rather, they knowingly elected to litigate their claims via the class action, and they are bound by that election.

A. The Fourth Circuit's decision is entirely consistent with the decisions of other Circuit Courts which have considered this issue. The Fourth Circuit's opinion itself recognizes that its decision is consistent with two of its prior decisions and another of the Fifth Circuit. [177a]. *Dalton v. Employment Sec. Comm'n.*, 671 F.2d 835 (4th Cir. 1982), cert. denied, 74 L.Ed.2d 117 (1982); *Woodson v. Fulton*, 614 F.2d 940 (4th Cir. 1980); *Kemp v. Birmingham News Co.*, 608 F.2d 1049 (5th Cir. 1979). It is also consistent with the decisions of the Circuit Courts in other cases: *Fowler v. Birmingham News Co.*, 608 F.2d 1055 (6th Cir. 1979); *Jones v. Bell Helicopter Co.*, 614 F.2d 1389 (5th Cir. 1980); and *Dosier v. Miami Valley Broadcasting Corp.*, 625 F.2d 1295 (9th Cir. 1981).

The Petitioners seize on statements in *Dickerson v. U.S. Steel Corp.*, 582 F.2d 827 (3rd Cir. 1978), for their assertion that having elected to participate as class members in the class action (which was unsuccessful), they now get a second chance to litigate their claims. [Pet. 12]. The statements relied on by Petitioners are mere dictum, and were specifically recognized as such by the Fourth Circuit. [182a-183a]. Plus, as the Petitioners would interpret it, that dictum is simply wrong and has not been adopted by any Circuit Court, including the Third Circuit Court which penned the dictum in the first place.

The actual holding of *Dickerson* was that non-named class member witnesses who had not satisfied jurisdictional prerequisites (such as Petitioners) may not be entitled to relief for an individual claim of discrimination if the class-wide claim encompassing their individual claims is dismissed. 582 F.2d at 834. The Circuit Court, in dictum, volunteered that there was not such commonality in the class and individual claims as to support *res judicata*. But, that Court nowhere authorized a subsequent separate lawsuit such as these petitioners attempt here.

Thus, a proper reading of *Dickerson* is that a class member (such as Petitioners) who wants to pursue relief on his personal claims in a bifurcated class action should satisfy the jurisdictional prerequisites and intervene in the class action. As the Fourth Circuit recognized, that is precisely how the Third Circuit *en banc* has subsequently interpreted *Dickerson*. See *Croker v. Boeing Co.*, 662 F.2d 975, 997 (3d Cir. 1981). Respondent has found *no case* that has interpreted *Dickerson* to authorize a subsequent individual suit by unsuccessful class members (and Petitioners have suggested none). In fact, the Seventh Circuit has cited *Dickerson* in denying relief to a non-party witness where classwide discrimination was not present. See *Clark v. Chrysler Corp.*, 673 F.2d 921, 929 (7th Cir. 1982). So, the Fourth Circuit's rejection of the dictum in *Dickerson* is proper and is consistent with other decisions involving this narrow issue. See *Dalton, Woodson, Kemp, Fowler, Dosier, supra*.

Petitioners improperly cite *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978), in support of their position. That case involved a prior

class action in which the plaintiffs were seeking *only* equitable relief from the general prison conditions such as segregated and unsanitary facilities. In his subsequent individual suit, Bogard sought damages for particular acts of physical punishment and abuse directed at him, some of which occurred after the record was closed in the class action. Thus, the thrust of the two actions was not the same. In addition, Bogard's individual claims were for damages against certain prison officials for *specific acts*, whereas the class action had been directed at the Governor and other officials who had the power to change *policy* at the prison. The Circuit Court also specifically held that the class notice was insufficient to alert prisoners to the possibility that they could seek individual money damages for personal wrongs as well as equitable relief. 586 F.2d at 408. Here, Petitioners were given adequate notice and the cause of action was the same in the class action and the subsequent individual action. So *Bogard* offers no support to Petitioners.

Petitioners also cite *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979). Like *Bogard*, that case involved a totally different situation than presented here. In fact, the Circuit Court there emphasized that res judicata was not a bar because there had been no notice to class members:

...because the agreement concerning the presentation of individual claims occurred only after trial thus prohibiting any form of notice to the claimants that such claims might be waived, it seems evident that class members whose claims were not actually litigated should not be estopped by res judicata.

[602 F.2d at 1298 (Citations omitted)].

Again, lack of adequate notice prompted the Circuit Court to state in dictum that individual claims may not be barred by the findings related to the class action. However, that is not the case here. As noted below at pp. 7-8, here Petitioners had specific written notice of their options in the class action and the consequences of each option. Consequently, *Marshall* does not support Petitioners' position.

Finally, Petitioners rely on *Eastland v. T.V.A.*, 704 F.2d 613 (11th Cir. 1983) (Petition for Rehearing granted in part), for the position that individual class members can prevail on their claims

even where there is a finding of no class discrimination. No Court, including the Fourth Circuit, has held otherwise. What Petitioners fail to point out is that the District Court in *Eastland*, prior to trial ruled that, while Eastland was not an appropriate representative for the class, his *individual claims* could be consolidated with the class action for trial. So, *Eastland* has nothing to do with the issue present here; and the Fourth Circuit's decision here is not inconsistent with it.

Not only do the cases cited by Petitioners not support their position, they have conveniently ignored the numerous cases from other Circuits which are consistent with the Fourth Circuit's holding and which were included in briefs filed in the Fourth Circuit. See *Dalton*, *Woodson*, *Kemp*, *Fowler*, *Dosier*, *supra*.

B. The Fourth Circuit's decision is completely consistent with decisions of this Court. The cases cited by Petitioners, *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978), *Teamsters v. United States*, 431 U.S. 324 (1977), and *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), authorize bifurcated trials in class actions. They involve the situation where an individual, at Stage II of the class action, obtains the advantage of a presumption of liability on his claim created by a finding of class discrimination at Stage I. Unless the employer can rebut that presumption at Stage II, the individual claimant will prevail. There is nothing inconsistent in those cases with the Fourth Circuit's decision here. In all instances, the class members are bound by the results of the class action. If there is a finding of class discrimination, then they receive the benefit of the presumption and the defendant is bound by that finding. Likewise, the claimants are bound if the Stage I decision is adverse. No decision of this Court authorizes class members to emerge from an *unsuccessful* class action and commence a subsequent series of individual suits.

Petitioner's assertion that *Connecticut v. Teal*, 457 U.S. 441 (1982), governs this case misses the crucial issue here entirely. There, this Court recognized that, even though an employer's "bottom line" promotion statistics were even-handed, there may be

individual instances of discrimination. That is true, but it is not the issue here. The issue here is whether Petitioners who elected to litigate their claims via the class action are bound by that election when the class action judgment is adverse to them. So, *Teal* has nothing to do with this case; and the Fourth Circuit's decision is not inconsistent with it.

C. Petitioners knowingly elected, after adequate notice, to pursue their individual claims as non-named class members in the *EEOC and Cooper* class action. Having pursued their claims via that vehicle, the Fourth Circuit's holding that they are bound by the adverse decision in that action is entirely consistent with principles of res judicata and FRCP Rule 23. The Fourth Circuit's decision does not deprive them of an opportunity to litigate their claims. It simply recognizes that they *have had that opportunity* and were not successful.

The fact is that these petitioners were formally notified of their options and they chose to litigate their claims via the *EEOC and Cooper* class action—and they were satisfied with that election until four months after they learned they were not successful. These petitioners were each personally notified that they were class members, that they could opt out of the class to pursue their individual claims, or that they could remain as class members, in which event they would be *bound by the class action whether favorable or unfavorable to the class*. With that knowledge, Petitioners chose to litigate their claims as non-named class members. Having made that election, they are bound by its result.

That result is particularly reasonable in this case because:

- these plaintiffs had never filed charges of discrimination with this EEOC;
- they were given *four years* notice of the opportunity to pursue their claims individually;
- they never moved to intervene in the class action even though their counsel had intervened on behalf of four other individuals and the Bank had not opposed that intervention;

- they were listed as potential discriminatees in Answers to Interrogatories during discovery in the class action, but never made any attempt to intervene or assert individual claims;
- they, through counsel, consented to a bifurcated trial of the class action;
- they first “appeared” in the class action on a witness list filed three days prior to the trial, but did not attempt to intervene even then;
- they testified at the trial of the class action, but made no attempt to intervene; and
- they made no attempt to assert their personal claims until about *four months* after they learned that they had not been successful in the class action.

Petitioners now assert that the Fourth Circuit denied them a chance to litigate their claims. But, the fact is that *they* made the election and were satisfied to litigate their claims as non-named class members in the *EEOC and Cooper* class action for over *four years*, through trial and thereafter until they found that the judgment was against them. The Fourth Circuit’s decision follows FRCP Rule 23 and principles of res judicata in holding that the petitioners are bound by the class action judgment.

D. The Fourth Circuit’s decision is also consistent with FRCP Rule 23 as specifically amended in 1966 to bind class members by the class action judgment and to prevent the very “one-way intervention” the petitioners attempted here.

FRCP Rule 23 itself provides that the judgment in a class action shall include all class members “whether or not favorable to the class.” In *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538 (1974), this Court noted that prior to 1966 the Rules permitted the practice of “one-way intervention”, or “allow[ing] class members to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.” 414 U.S. at 547-48. The Court noted that Rule 23 was amended in 1966 *to eliminate that abuse*, and explained the current Rule 23 consequences as follows:

Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation "as soon as practicable after the commencement" of the action when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. *Thereafter they are either nonparties to the recovery or to be bound by the judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.*

[414 U.S. at 549 (Emphasis added)].

The Fourth Circuit in *Woodson v. Fulton*, *supra*, recognized the purpose of class actions and the importance of the binding effect of their judgments:

The record shows that Woodson was a member of the class, had ample notice, and was ready and willing to use the class action to obtain his recovery in the event his personal action failed. I think we ignore important policies underlying class actions when we allow plaintiff, in effect, to present his claim in two simultaneous lawsuits and choose the one yielding the better result.

[614 F.2d at 943 (Hall, J., concurring in part and dissenting in part)].

The same notion was recognized by the Fifth Circuit in *Kemp*, *supra*. So, the Fourth Court's ruling that these petitioners are bound by the judgment in the class action is entirely consistent with the language and the purpose of Rule 23.

The practical consequence of the relief sought by Petitioners would destroy the class action. Their argument is that: although they were class members who appeared and testified in furtherance of the *EEOC and Cooper* class action, after they discovered their class had been unsuccessful, they are entitled to file subsequent individual actions to pursue their claims. There is nothing to distinguish these plaintiffs from any other class members. So, taken to its logical extent, their argument would mean that: if an employer-defendant in a class action was completely successful and defeated the class

action totally, it would nevertheless be subject to further suits by *each and every class member* on their "individual claims." Such a result would render FRCP Rule 23 meaningless.

Petitioners suggest that there is great risk of "massive intervention" because, supposedly, no class member would "risk" the class determination. But, that actually is unlikely. For example, in the *EEOC and Cooper* action itself each class member—including Petitioners—was personally given explicit notice of their options in the class action and that, if they chose to proceed as class members, they would be bound by the class judgment "whether favorable or unfavorable." That is essentially the same message as the Fourth Court's decision. But, there was no "massive intervention" in *EEOC and Cooper*. Even these petitioners, who had testified at the trial, did not seek to intervene until four months *after* they learned they had lost in the class action. Moreover, there are also "risks" inherent in a class member's decision to pursue his claims *individually*. For example, Elmore Hannah was named intervenor in *EEOC and Cooper* and was in the class that was *successful* in the District Court, but he had elected to pursue his *individual* claims, and the District Court found *against* him. Finally, if any "massive intervention" were to occur, the Courts are equipped to deal with that situation just as they are to manage any other litigation.

In conclusion, there is no conflict between the Fourth Circuit's decision and the decisions of other Circuit Courts or of this Court; after explicit written notice, the Petitioners elected to pursue their claims via the vehicle of the class action; and the Fourth Circuit's decision properly bound Petitioners to their election; and that decision is consistent with the purpose and letter of FRCP Rule 23 and principles of *res judicata*.

II.

**The Fourth Circuit's "Disapproval" Of The District
Court's Adoption Counsel-Prepared Findings
Of Fact Does Not Merit Review By This Court.**

The Fourth Circuit in this case "disapproved" of the District Court's virtual verbatim adoption of findings of fact prepared by Petitioners' counsel. Petitioners cite a number of cases in which Circuit Courts make varying comments about the propriety of that practice, and suggest that this Court resolve those differences in approach among the Circuits. The Bank submits that this issue does not merit review by this Court for the following reasons: (A) This Court has spoken clearly and unambiguously on this issue. (B) The "conflict" among the Circuits, if any, relates only to a matter of "preference" in the nature of a "local rule" on which uniformity is not required. (C) Regardless of their opinions about the propriety of adopting counsel-prepared findings of fact, no Circuit Court has held that to be reversible error in itself and all Circuit Courts have properly applied the "clearly erroneous" standard of FRCP Rule 52 (a) to the District Courts' findings, regardless of their source. (D) Here, the Fourth Circuit "disapproved" of the adoption of counsel-prepared findings, but it expressly applied the "clearly erroneous" standard of Rule 52 (a) to those findings and reversed the District Court only because it concluded that the findings were not supported by substantial evidence and, thus, were "clearly erroneous."

A. This Court spoke on the propriety of adopting counsel prepared findings of fact in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). There, the Court stated that:

Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence.... Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.

[376 U.S. at 656 (Citations and footnotes omitted)].

After making that observation, the Court went on to reverse the judgment below, not because the findings were prepared by counsel,

but because the evidence did not support the judgment. *Id.* So, the pattern of analysis established by this Court in *El Paso* is: regardless of the source of the findings of fact, they are the findings of the District Judge and should be tested against the substantial evidence in the Record. That pattern has been consistently followed in each of the cases cited by Petitioners [Pet. 19-38] and was followed by the Fourth Circuit in this case.

B. The differences in approach to counsel-prepared findings among the Circuits relate to a matter of "preference" as to form on which they are permitted to differ. Rule 47 of the Federal Rules of Appellate Procedure permits Circuit Courts to adopt "local rules" not inconsistent with those Rules. The Bank submits that that is all the different comments about counsel-prepared findings amount to—local rules of preference or practice. Analysis of each of the cases cited by Petitioners [Pet. 19-38] discloses that, regardless of what comment the Circuit Courts made about the practice of adopting counsel-prepared findings, the Courts applied the "clearly erroneous" standard of Rule 52(a) to those findings. Since the test applied is the Rule 52(a) standard and not the *source* of the findings, any comment about adoption of counsel-prepared findings cannot be the legal test, but must be something less—a local rule of preference or practice.

Pursuant to FRAP Rule 47 and 28 U.S.C. §2071, the Circuit Courts have the general supervisory powers to regulate practices regarding such diverse matters as: restriction of the use of supplemental instructions, *United States v. Cheramie*, 520 F.2d 325 (5th Cir. 1975); administration of mandamus authority, *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968); and promulgation of rules to "regulate the practice of the court and to facilitate the transaction of its business," *Washington-Southern Nav. Co. v. Balto. and Phil. Steamboat Co.*, 263 U.S. 629, 635 (1924). The varying comments by the Circuit Courts do not purport to be substantive rules of law, but are merely statements of preference or direction to "regulate the practice of the court and facilitate the transaction of its business." *Id.* Consequently, the Circuit Courts are free to differ in their practice regarding adoption of counsel prepared findings.

Moreover, upon analysis of the cases cited by Petitioners, the apparent divergence in approval and disapproval of the practice at issue largely disappears. In fact, virtually all of the cases Petitioners cite for favoring counsel-prepared findings [Pet. 20-23] are unusual patent, copyright or admiralty cases. In fact, Petitioners selectively quote from one case as favoring the practice, but conveniently fail to note that the case is a patent case which itself limits its approval to cases where the evidence is "highly technical." *Scheller-Globe Corp. v. Milsco Mfg. Co.*, 636 F.2d 177, 178 (7th Cir. 1980) (...the procedure can be of considerable assistance to a trial court where the evidence is highly technical.") [Emphasis added to language omitted by Petitioners at Pet. 22]. So, except for the limited exception of "highly technical" patent, copyright and admiralty cases, the very cases cited by Petitioners show that the practice of adopting counsel-prepared findings has received generally negative reception by the Circuit Courts — just as it did in this Court in *El Paso* (judge drawn findings would have been "more helpful"). 376 U.S. at 656.

In like manner, Petitioners' assertion of a "complete reversal" in the Fourth Circuit's approach to counsel-prepared findings is simply a product of a misquote. [Pet. 26]. Petitioners assert that the Fourth Circuit originally favored the practice in *The Severance*, 152 F.2d 916 (4th Cir. 1945), by quoting the Court as follows: "[t]his practice is not to be condemned." [Pet. 26]. But, the Fourth Circuit actually stated: "This practice is not to be *commended*." 152 F.2d at 918 (Emphasis added). So, the present case is consistent with the position of the Fourth Circuit dating back to 1945 and with other Circuits in all but "highly technical" patent, etc. cases.

The extent of favor or disfavor of the practice in the cases cited by Petitioners varies in degree. But, this is explained by the varying circumstances of the cases. While the practice of adopting counsel prepared findings may be properly favored as of "considerable assistance" in "highly technical cases" *Scheller-Globe, supra*, it is not inconsistent to find the practice "disapproved" in a case such as this one where it resulted in findings of discrimination based on patently contrived statistical evidence, promotion of one individual to a job she never sought (by her own testimony) and promotion of

another individual to supervise the operation of a machine she admitted she had never fully learned to operate, and the exclusion from consideration of virtually all of the Bank's evidence. See discussion at pp. 16-17, *infra*. The cases cited by Petitioners are not *conflicting*; they result from a consistently applied principle to dissimilar circumstances.

Finally, it is important to bear in mind that no court has considered the practice of adopting counsel-prepared findings significant enough to reverse the findings on that account. The practice is simply an administrative matter for the Circuits to police as they deem appropriate.

C. Petitioners acknowledge that "no court regards the practice [of adopting counsel-prepared findings] as reversible error." [Pet. 28]. In fact, in the cases cited by Petitioners, whether or not the practice is greeted with favor or disfavor, the Courts consistently apply the "clearly erroneous" standard of FRCP Rule 52 (a).

For example: *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 570 F.2d 554 (6th Cir. 1977), is cited by Petitioners as approving the practice. There the Circuit Court stated that:

The question is whether the factual findings and conclusions of law adopted by the Court are supported by substantial evidence, and if they are, it makes no real difference which counsel submitted them.
[570 F.2d at 558].

The Circuit Court then affirmed the findings because they were supported by substantial evidence. *Id.* In *Schwerman Trucking Co. v. Gartland Steamship Co.*, 496 F.2d 466 (7th Cir. 1974), also cited as favoring the practice, the Circuit Court noted that:

"...The challenged findings are not clearly erroneous. We think the factual basis for the ultimate conclusion arrived by the district judge is clearly manifested by the record, regardless of who composed the words and phrasing entered below."

[496 F.2d at 475 (quoting *Penn-Texas Corp. v. Morse*, 242 F.2d 243, 247 (7th Cir. 1957)].

In *Askew v. United States*, 680 F.2d 1026 (8th Cir. 1982), the Circuit Court "disapprove[d]" c. the practice, following *El Paso*, but it held that the findings "will stand if supported by evidence" and affirmed the judgment below. 680 F.2d at 1209. In *Kelson v. United States*, 503 F.2d 1291 (10th Cir. 1974), the Circuit Court "condemned" the practice, but reversed only because the "objective facts" required reversal. 503 F.2d at 1295. In *Roberts v. Ross*, 344 F.2d 747 (3rd Cir. 1965), the Circuit Court "disapprove[d]" the practice, but reversed the judgment only because the "findings necessary to support the judgment are lacking." 344 F.2d at 752-53. Analysis of the other cases cited by Petitioners demonstrates a similar and consistent adherence to the "clearly erroneous" standard in affirming or reversing the judgment below, regardless of whether the practice of the lower court was favored or disfavored.

The D.C. Circuit summarized the basic principle at work in these cases in *Schilling v. Switzer-Cummins Co.*, 142 F.2d 82 (D.C. Cir. 1944):

If inadequate findings result from improper reliance upon drafts prepared by counsel—or from any other cause—it is the *result* and not the *source* that is objectionable.

[142 F.2d at 83 (Emphasis added)].

Consistently, the determining factor in whether the Circuits reverse or affirm the District Court's judgment has been whether it was supported by substantial evidence, and not the "source" of the findings—even in those cases where the Circuit Court disapproved of that "source."

D. The Fourth Circuit applied the "clearly erroneous" standard of FRCP Rule 52(a) in this case. The Fourth Circuit specifically noted that: "The adoption by the District Court of proposed findings and conclusions, though disapproved, will not, however, warrant reversal of the cause *per se* nor does it mean that the 'clearly erroneous' rule of Rule 52(a) will not be applied at all..." [21a]. However, because of the circumstances of this case, the Fourth Circuit felt that the adopted findings called for "more careful scrutiny." [23a].

In this particular case the Circuit Court was led to more carefully scrutinize the "adopted findings" because the Record demonstrated that they were supported by insufficient or flawed evidence, they wholly ignored much contrary uncontroverted evidence, or in some instances they were wholly baseless. Petitioners now accuse the Fourth Circuit of "de novo appellate review" and "independent fact-finding." [Pet. 32, 36]. But, the fact is that, because of the gross error and insufficiency of Petitioners' proposed findings adopted by the District Court, FRCP Rule 52(a) *required* the detailed analysis of those findings by the Circuit Court.

The deficiencies of the adopted findings are all noted at length in the Fourth Circuit's opinion. Examples of some of these deficiencies noted by the Fourth Circuit illustrate the need for a careful review of the adopted findings: (a) With respect to the finding of discrimination in promotions out of Grades 4 and 5: The adopted findings purported to rely on the personal examples of ten class-member witnesses. But, of the ten, only *two* had not been promoted out of Grades 4 and 5, and one of those two was specifically found not to have been discriminated against. [34a-38a]. The adopted findings also were based on statistical exhibits which did not include the actual number of promotions involved and about which the Petitioners' own expert admitted his choice of methodology "changed the statistics dramatically." [56a-59a]. Moreover, the adopted findings ignored virtually all of the statistical and other evidence offered by the Bank. [117a-123a].

(b) With respect to the findings of discrimination against Constance Russell: The adopted findings found she had been unlawfully denied a Grade 7 job, even though her own testimony was that all she had sought was a Grade 6 job (and she got that). [130a-134a]. The adopted findings also found that Russell had been given an unfair performance appraisal because she had filed a Charge of Discrimination, even though Russell herself acknowledged that the appraisal was made *before* she filed her Charge. [144a]. Finally, regarding her discharge for absenteeism, the adopted findings ignored the undisputed facts that the comparable employees who were not fired had improved their records whereas Russell had not,

that the other white employee whose record did not improve was also fired, but that she was not offered a transfer that was offered to Russell. [145a-146a].

(c) With respect to the findings of discrimination against Sylvia Cooper: The adopted findings found Cooper qualified to *supervise* the operation of a Reader-Sorter machine, even though Cooper herself admitted that she could not fully operate the machine and that earlier she had asked to be relieved from training on the machine. [161a-166a]. The adopted findings also found that Cooper had been constructively discharged, notwithstanding a total absence of any evidence of any intent by the Bank to force her to quit (and in the face of ample evidence to the contrary). [169a]. For additional examples of deficiencies in the adopted findings see the opinion of the Fourth Circuit at 34a-38a, 56a-83a, 117a-123a, 130a-140a, and 161a-169a.

These erroneous, unsupported and often baseless findings adopted by the District Court, apparently without scrutiny, required that the reviewing Appellate Court carefully scrutinize the findings.

Notwithstanding the pervasive error in the counsel-prepared findings, the Fourth Circuit properly tested the findings on the "clearly erroneous" standard of Rule 52(a). That standard has been defined by this Court as follows:

A finding is "clearly erroneous" when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

[*United States v. U.S. Gypsum*, 333 U.S. 364, 395 (1948)].

The Fourth Circuit announced the standard it applied in virtually identical language:

... when, the reviewing court, on the entire record, "is left [after making such review] with the definite and firm conviction that a mistake has been committed," ... or it is convinced that "the result in a particular case does not reflect the truth and right of the case," ... it is *the duty*

of the appellate court to reverse the findings and conclusions *as clearly erroneous*.

[24a (Emphasis added and citations omitted)]

True to Rule 52(a), the Fourth Circuit then proceeded to apply the "clearly erroneous" standard to each segment of the District Court's adopted findings: (a) Regarding the finding of discrimination in promotions out of Grades 4 and 5, the Appellate Court found the District Court's reliance on the testimony of class number insufficient as a matter of law. [34a-35a; 38a]. It further concluded that the District Court committed "clear error" in relying on "skewed analyses" which "disregarded the far more reliable tables." [116a]. And, finally it concluded that the District Court's findings were "not supported by any substantial evidence" either live or statistical and that the findings were "clearly erroneous without any substantial support in the record." [128a-129a].

(b) Regarding the findings that Russell had been discriminated against, the Fourth Circuit concluded that there was "no basis or justification for such a finding in this Record" [135a]; that the "findings of the District Court to the contrary simply have no support in the record" [144a]; that it was "unable to find any substantial evidence to support a finding . . ." [150a]; and that there was "no evidence of pretext . . . and beyond question there was no racial bias involved." [153a].

(c) Regarding the findings that Cooper had been discriminated against, the Fourth Circuit concluded that "There is simply not any evidence in this case of any racial motivation in the defendant's act of preferring Morgan over Cooper . . ." [160a]; and that "Cooper failed entirely to meet this burden [of showing pretext] and the finding of the District Court to the contrary is without substantial support in the record and was clearly erroneous." [167a]. The Fourth Circuit also concluded that there was "no basis in the record for a finding of constructive discharge;" [168a] that there was "absolutely no evidence" that the defendant sought to force Cooper to quit and the "evidence was quite to the contrary" [169a]; and that there was "nothing to support a finding of discriminatory purpose." [171a].

So, the analysis of the Fourth Circuit's opinion itself demonstrates that it properly applied Rule 52(a)'s "clearly erroneous" standard to the findings of the District Court (regardless of their source) and reversed the District Court only because it found those findings "clearly erroneous." In so doing the Fourth Circuit acted properly and consistently with the direction of this Court and the decisions of the other Circuit Courts.

III.

The Fourth Circuit's Decision Comports With *Pullman-Standard v. Swint*.

Petitioners contend that the Fourth Circuit violated the Court's recent dictates in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). There, this Court rejected the Appellate Court's refusal to apply Rule 52(a) to findings of "ultimate fact." The Fourth Circuit's opinion here did make reference to a finding of "ultimate fact." [15a]. But, that reference was limited to the District Court's three-page "Memorandum of Decision"—not its subsequent "Findings of Fact and Conclusions of Law." The District Court's Memorandum of Decision did not even purport to be the Court's Rule 52(a) "findings." In fact, the Memorandum of Decision itself ordered that such "findings" be prepared by plaintiffs' counsel and submitted to the Court. So, the Fourth Circuit's reference to findings of "ultimate fact" was directed at the Memorandum of Decision which was not a "finding" at all. As to the actual "findings" subsequently adopted by the District Court, the Fourth Circuit properly applied the Rule 52(a) "clearly erroneous" standard—as demonstrated above at pp. 16-18 *supra*. So, the Fourth Circuit's opinion was faithful to the dictates of *Pullman-Standard v. Swint*.

CONCLUSION

The Bank submits that the Petition for Certiorari should be denied for the reasons that: (I) There is no conflict among the Circuit Courts about the binding effect of a class action judgment and the Fourth Circuit properly applied the principles established by this Court in *American Pipe and Constr. Co. v. Utah*; (II) There is no conflict among the Circuits about application of the "clearly erroneous" standard of FRCP Rule 52(a), regardless of how the District Court's findings were prepared; and (III) The Fourth Circuit followed this Court's dictates of *Pullman-Standard v. Swint*.

Respectfully submitted this 3rd day of October, 1983.

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No. 83-185

Office-Supreme Court, U.S.

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TEVAS,

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, ET AL., PETITIONERS

v.

FEDERAL RESERVE BANK OF RICHMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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FEDERAL RESERVE BANK OF RICHMOND

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
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MEMORANDUM FOR THE FEDERAL RESPONDENT

Petitioners Cooper, et al., contend that the court of appeals failed to give proper weight to the findings of the district court.¹

1. On March 22, 1977, the Equal Employment Opportunity Commission brought a civil action in the

¹ Petitioners Baxter, et al., also contend that they should not have been barred from asserting their individual claims of discriminatory treatment by the finding of no discrimination against the group to which they belong. Since the EEOC was not a party to the *Baxter* proceedings below, we express no views on this issue here.

United States District Court for the Western District of North Carolina alleging that the Federal Reserve Bank of Richmond had violated Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), by failing to promote black employees at its Charlotte, North Carolina, branch because of their race. The complaint also alleged that the Bank had specifically discriminated against Sylvia Cooper by failing to promote her and subsequently discharging her because of her race. On September 21, 1977, the district court permitted Cooper and three other individuals to intervene in the action; a class consisting of "[a]ll black persons who have been employed by the defendant at its Charlotte Branch Office at any time since January 3, 1974 * * *, who have been discriminated against in promotion, wages, job assignments and terms and conditions of employment because of their race" was conditionally certified on April 26, 1978 (Pet. App. 199a-200a; footnote omitted).

Following an eight-day bench trial and consideration of additional submissions by both parties (Pet. App. 199a), the district court issued a Memorandum of Decision holding "that defendant engaged in a pattern and practice of discrimination from 1974 though 1978 by failing to afford black employees opportunities for advancement and assignment equal to opportunities afforded white employees in pay grades 4 and 5" (*id.* at 193a-194a). The court further held that the Bank had intentionally discriminated against Ms. Cooper and one other intervenor but had not discriminated against the other intervenor (*id.* at 192a).²

² It also concluded (Pet. App. 194a) that "there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief" for employees in other

The court directed the plaintiffs to submit proposed findings of fact and conclusions of law consistent with the above findings. After considering the Bank's comments regarding the plaintiffs' proposed findings, the district court on May 29, 1981, issued Findings of Fact and Conclusions of Law that were nearly identical to those submitted by plaintiffs (*id.* at 197a-285a).

2. The court of appeals reversed. Noting that the district court's Memorandum of Decision concluding that the Bank had engaged in a pattern and practice of discrimination was an "ultimate fact * * * not a finding of fact reviewable under the 'clearly erroneous' rule, and sustainable only if adequate supportive subsidiary findings are made" (Pet. App. 15a), the court focused on the detailed findings and conclusions of May 29, 1981.

Although the court of appeals "expressed [its] disapproval" of the practice of requesting the prevailing party to provide findings of fact and conclusions of law which the court then "adopts almost word-for-word in support of its previously announced decision" (Pet. App. 16a-17a), the court of appeals recognized that such a procedure does not render inapplicable

pay grades. The Baxter class members, in pay grades over 5, thereupon moved to intervene individually. The court denied the motion, noting that "I see no reason why * * * they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week" (Pet. App. 288a).

The Baxter petitioners thereupon filed a separate action, alleging that the bank had discriminatorily denied each of them promotions because of their race, in violation of 42 U.S.C. 1981 (Pet. App. 176a). The district court denied the Bank's motion to dismiss, and certified the question to the court of appeals (*id.* at 290a-291a), where it was consolidated with the Bank's appeal in *Cooper* (*id.* at 172a).

the requirement of Fed. R. Civ. P. 52(a) that the district court's findings of fact must be upheld unless clearly erroneous (Pet. App. 21a). Nevertheless, it agreed with a number of other courts of appeals that such findings should be subjected to "‘careful scrutiny’ by the appellate court * * * [and should be] ‘more narrowly’ examined than findings and conclusions which, because developed independently by the trial judge, provide assurance that the District Judge making the findings and conclusions ‘did indeed consider all the factual questions thoroughly and * * * guarantee[s] that each word in the finding [was] impartially chosen’" (Pet. App. 23a-24a; citations omitted). Applying this "‘careful scrutiny’" to the anecdotal and statistical evidence in the record, the court of appeals concluded that the district court's factual findings were clearly erroneous (*id.* at 29a-172a). It directed dismissal of the class and individual claims (*id.* at 129a, 153a, 172a).³

3. Petitioners contend (Pet. 19-38) that the court of appeals failed to apply the "clearly erroneous" standard required by Fed. R. Civ. P. 52(a) in reviewing the district court's factual findings, and that there is an inter-circuit conflict on the standard for review of factual findings that have been proposed by a party and adopted substantially without change by the district court. Like petitioners, we believe that the record fully supports the district court's factual findings. Unlike petitioners, we believe the court articulated the appropriate standard of review in this case—the clearly erroneous standard. However, the court ap-

³ The court also concluded that the Baxter petitioners' Section 1981 suit should have been dismissed, on the theory that, because they were part of the class certified in the original action, their claims were *res judicata* (Pet. App. 172a-183a).

plied a more searching review of the court's findings because of their origin. There is some disparity in the circuits on the way such findings are approached. This difference of approach, in our view, does not rise to the level of a conflict warranting review by this Court.

The Equal Employment Opportunity Commission, as a plaintiff below, presented substantial anecdotal and statistical evidence to support the charge that the Bank discriminated against blacks in its promotion policies. The district court concluded that this evidence was persuasive and un rebutted. While we disagree with the court of appeals' reversal of the district court's factual findings supporting this conclusion, we do not believe that reversal resulted from the application of an incorrect standard of review, or was inconsistent with any decisions of this Court or any other court of appeals. See, *e.g.*, *U.S. Postal Service v. Aikens*, No. 81-1044 (Apr. 4, 1983).

The court of appeals' disapproval of the practice of requesting the prevailing party to prepare findings of fact, and then adopting them verbatim, is consistent with this Court's comments in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 & n.4 (1964), and *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184-185 (1944). But the court of appeals also followed this Court's conclusion in those cases that such findings "are nonetheless the findings of the District Court" (323 U.S. at 185; see also 376 U.S. at 656), which accordingly must be reviewed under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) (Pet. App. 21a).

Most circuits that have considered this issue have disapproved of the practice and concluded that findings adopted verbatim by a district court from pro-

posals requested from the prevailing party should be particularly carefully reviewed on appeal.⁴ Two circuits have, however, rejected criticisms of the practice. *O'Leary v. Liggett Drug Co.*, 150 F.2d 656, 667 (6th Cir. 1946); *Schilling v. Schwitzer-Cummins Co.*, 142 F.2d 82, 83 (D.C. Cir. 1944). Accordingly, we agree with petitioners that there is a split in the circuits on this issue. We do not, however, believe that this difference in approach will result in significant differences in the level of appellate review under Fed. R. Civ. P. 52(a); an appellate court cannot, in any event, ignore the circumstances under which the district court's findings have been made. There are, in addition, semantic differences in the way that courts that disapprove of the practice formulate the appropriate level of scrutiny⁵ as well as differences in the

⁴ See, e.g., *Scheller-Globe Corp. v. Milaco Mfg. Co.*, 636 F.2d 177, 178 (7th Cir. 1980); *Ramey Constr. Co. v. Apache Tribe*, 616 F.2d 464, 469 n.7 (10th Cir. 1980); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir. 1980); *Hill & Range Songs v. Fred Rose Music, Inc.*, 570 F.2d 554, 558 (6th Cir. 1978); *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1341 n.6 (2d Cir. 1974); *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 (1st Cir. 1970); *Roberts v. Ross*, 344 F.2d 747, 751-752 (3d Cir. 1965); *Bradley v. Maryland Casualty Co.*, 382 F.2d 415, 423 (8th Cir. 1967).

⁵ See, e.g., *Ramey Constr. Co. v. Apache Tribe*, 616 F.2d at 467 (will review "with a more critical eye"); *Continuous Curve Contact Lenses, Inc. v. Rynco Scientific Corp.*, 680 F.2d 605, 607 (9th Cir. 1982) (will give "special scrutiny"); *In re Las Colinas, Inc.*, 426 F.2d at 1010 (will undertake "most searching examination for error"); *Roberts v. Ross*, 344 F.2d at 752 (such findings "likely to be looked at * * * more narrowly and given less weight on review"). We do not believe that these differences reflect a substantial difference in approach, or are likely to lead to different results in similar cases. Nor do we believe that this heightened scrutiny means that

manner in which the courts dispose of a case after rejecting findings adopted verbatim by the trial court. For instance, some courts remand for further findings⁶ while others substitute their own assessment of the facts.⁷ We believe the better approach is to remand the case for new findings by the district court. We are not aware of any circumstances which would justify the failure of the court below to follow that practice here.

4. Petitioners also assert (Pet. 38-40) that the decision below is inconsistent with *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), and merits summary reversal on that ground. This Court emphasized in *Pullman-Standard* that "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. * * * It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts" (456 U.S. at 287). Specifically, the Court held that the question whether the differential racial impact of a seniority system

the appellate courts are failing to comply with the requirements of Fed. R. Civ. P. 52(a) and undertaking de novo review in such cases. In fact, the courts have frequently recognized, as did the court below, that the clearly erroneous standard of Rule 52(a) must be applied. *Scheller-Globe Corp. v. Milsco Mfg. Co.*, 636 F.2d at 178; *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d at 258; *In re Las Colinas, Inc.*, 426 F.2d at 1010; cf. *Hill & Range Songs v. Fred Rose Music, Inc.*, 570 F.2d at 558.

⁶ See, e.g., *In re Las Colinas, Inc.*, 426 F.2d at 1010; *Ramey Const. Co. v. Apache Tribe*, 616 F.2d at 468; *Schilling v. Schweitzer-Cummins Co.*, 142 F.2d at 83.

⁷ See, e.g., *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d at 259.

reflected an intent to discriminate was a purely factual question (456 U.S. at 287-288). But it carefully distinguished the "much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact" (456 U.S. at 289 n.19), and cited as an example of such mixed questions those that "in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent" (456 U.S. at 289). Accordingly, the reference of the court below to the district court's conclusion in its Memorandum of Decision that the Bank had discriminated in promotions as a "statement of ultimate fact" (Pet. App. 15a) and its review under the "clearly erroneous" standard of the factual findings on which that conclusion is based do not appear to be inconsistent with the rationale of *Pullman-Standard*.

Should this Court grant certiorari with respect to Questions 2 and 3 presented in the petition, we would urge that the court of appeals should have either upheld the district court's finding, or remanded the case to that court for the entry of new findings. We take no position with respect to Question 1.

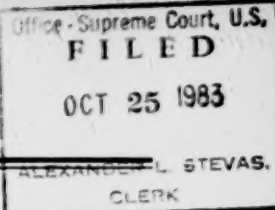
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OCTOBER 1983

No. 83-185



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

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On Petition for a Writ of Certiorari to the
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For the Fourth Circuit

PETITIONER'S REPLY BRIEF

1. Respondents acknowledge that the court of appeals dismissed as a finding of "ultimate fact" the district court's conclusion that petitioners were the victims of intentional racial discrimination. They do not of course challenge the correctness of the decision in Pullman-Standard v. Swint, 456 U.S. 273 (1982) rejecting the purported

distinction between "ultimate" and "subsidiary" facts.

Respondents defend the decision of the court of appeals on the bold theory that the Fourth Circuit simply did not mean what it said. But while respondents both urge this Court to disregard the literal language of the panel opinion, they are unable to agree about what that opinion does mean. The Bank asserts that what the panel meant to say was that, because the finding of discrimination was contained in a document entitled "Memorandum of Decision", it was not really a "finding" within the meaning of Rule 52(a). (Bank Brief, 19). The United States rejects that interpretation, suggesting instead that what the panel meant was that the district finding involved a "mixed question of law and fact." (U.S. Brief, p. 8).

This Court has not heretofore upheld lower court opinions literally and expressly contrary to decisions of this Court based on

such speculation that an erroneous passage may have been a mere slip of the judicial pen. Meaningful appellate review would be impossible if the actual language of the opinions under review could be disregarded on the basis of this sort of conjectural exegesis.— It is sufficient to require summary reversal that the Fourth Circuit opinion as written is inconsistent with Swint. If the court of appeals intended to say something other than what appeared in its opinion, it will have ample opportunity to make that clear on remand.

2. The United States candidly acknowledges the division among the circuits regarding the use of findings drafted by counsel. (U.S. Brief, pp. 5-7). The government suggests the "better approach" in such situations is for the court of appeals "to remand the case for new findings by the district court", as in fact occurs in the First and Tenth Circuits. (U.S. Brief, p.7;

see also Petition, p. 18). The government notes that it is "not aware of any circumstances which would justify the failure of the court below to follow that practice here." (U.S. Brief, p. 7).

Although the court of appeals itself announced that it was applying a special standard of review in this case, alternatively phrased as "close scrutiny" and "careful scrutiny" (Petition, 23a), respondents insist that the decision below actually applied the ordinary "not clearly erroneous" standard. (Bank Brief, pp. 11, 12, 15; United States Brief, p. 5). The United States takes the position that the court of appeals applied the correct standard, yet somehow reached the wrong result, insisting that "the record fully supports the district court's factual findings." (U.S. Brief, p. 4). But while the United States contends that affirmance is required by the not clearly erroneous rule, the Bank maintains that the same rule requir-

ed reversal of the "erroneous, unsupported and often baseless findings adopted by the District Court." (Bank Brief, p. 17).

In Pullman-Standard v. Swint, 456 U.S. 273 (1982), as here, the court of appeals articulated two different standards of review. Respondent in that case urged the Court to assume or conclude that the correct standard had in fact been applied, but this Court declined to do so. 456 U.S. at 290-93. This case illustrates the correctness of, and is controlled by, Swint. If mere mention of the Rule 52 standard were sufficient to give rise to a conclusive presumption that the not clearly erroneous rule had been applied, enforcement of Rule 52 by this Court would be impossible, and "not clearly erroneous" would degenerate from a rule of law to an empty formula recited at the end of de novo appellate decisions.

3. Respondents suggest that the principle of *res judicata* was applicable to the

Baxter plaintiffs because the district court's decision on the class claims actually resolved on the merits the individual claims of Baxter, et al.:

The District Court's Memorandum of Decision concluded that the Bank had discriminated ... only in promotions out of Grades 4 and 5, but not in other respects. 1/

Elsewhere the Bank repeatedly but more subtly implies that the individual claims were actually considered and decided, referring for example to "the class action judgment ... adverse to" the Baxter plaintiffs (Bank Brief, p. 7; see also id. at 3, 6, 9). The actual language of that portion of the district court's opinion dealing with promotions out of the grades in which the Baxter plaintiffs were found, however, reads:

1/ Respondent's Brief in Opposition to Petition (hereinafter cited as "Bank Brief") (Emphasis added), p.1; see also Memorandum for the Federal Respondent (hereinafter cited as "U.S. Brief"), p. 1 n. ("the finding of no discrimination against the group to which they belong").

There does not appear to be a pattern and practice pervasive enough for the court to order relief. 194a.

This passage holds only that such discrimination was not sufficiently widespread to justify a class-wide remedy. Far from concluding that no class member had ever been the victim of discrimination, the clear import of the opinion is to the contrary.

The Bank further asserts that the Baxter plaintiffs have had "their day in court." (Bank Brief, p. 3). When that day supposedly was the Bank does not say. It certainly was not in mid-September, 1980, when the Bank successfully prevented the Baxter plaintiffs from even testifying at the Cooper trial about their individual claims. Nor was it January, 11, 1983, when the Fourth Circuit held, at the Bank's behest, that there was never to be a trial in Baxter itself. Never in the history of this dispute, despite repeated efforts to do so, have Phyllis Baxter, Brenda Gilliam, Glenda Knott and

Sherri McCorkle been permitted to take the stand and describe to a federal judge the alleged violation of their rights. The principles of res judicata cannot conceivably apply to claims that were neither adjudicated nor even heard.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

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FILED

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CLERK

IN THE

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QUESTION PRESENTED*

Did the Court of Appeals err in holding that a prior finding that any pattern or practice of employment discrimination was not "pervasive" precludes, as a matter of res judicata, all employees from litigating any individual claims of discrimination?

*The parties to this litigation are set out at p. ii of the Petition.

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On Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit
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BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the court of appeals
is reported at 698 F.2d 633, and is set out
at pp. 1a-185a of the Appendix to the

Petition for Writ of Certiorari (hereinafter cited as "P.A."). The order denying rehearing, which is not yet reported, is set out at P.A. 186a. The district court's Memorandum Decision of October 30, 1980, is not reported, and is set out at P.A. 191a-96a. The district court's Findings of Fact and Conclusions of Law, which are not reported, are set out at P.A. 197a-285a. The district court orders of May 29, 1981, and February 26, 1982, which are not reported, are set forth at P.A. 286a-89a and P.A. 290a-97a respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1983. A timely Petition for Rehearing was filed, which was denied on April 6, 1983 by an equally divided court. (P.A. 186a). This Court granted an extension of time in which to

file the Petition for Writ of Certiorari until August 4, 1983. The Petition for a Writ of Certiorari was filed on August 4, 1983, and was granted on October 31, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 23(c)(3), Federal Rules of Civil Procedure, provides:

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

STATEMENT OF THE CASE

On March 22, 1977, the EEOC brought suit against the Federal Reserve Bank of Richmond alleging that the Bank had discriminated against black employees in making promotions at its Charlotte, North Carolina facilities, and that it had discriminated in particular against Sylvia Cooper because of her race, first by refusing to promote her to a supervisory position and then by discharging her. Jurisdiction was asserted under 42 U.S.C. § 2000e-5. (J.A. 6a-11a). On September 21, 1977, Cooper and three other present or former Bank employees (the "Cooper plaintiffs") were permitted to intervene as plaintiffs. (J.A. 12a-23a). On April 28, 1978, the district court certified a plaintiff class consisting of blacks who had been employed at the Bank's Charlotte branch since January 3, 1974, and had been

discriminated against on the basis of race. (J.A. 24a-32a).

The case was tried without a jury in September, 1980. The case was heard under the bifurcated procedure common in Title VII class actions, and expressly sanctioned by this Court in International Brotherhood of Teamsters v. United States, 431 U.S. 360 (1977). Under that procedure plaintiffs were required to establish at the September 1980 hearing that there had been a practice of classwide discrimination; if that burden were met, the identities of the particular class members who were the victims of that practice were to be resolved at a later hearing.

At the September, 1980, trial Phyllis Baxter and four other^{1/} black Bank employees

^{1/} Brenda Gilliam, Glenda Knott, Alfred Harrison and Sherri McCorkle. Emma Ruffin also sought to testify, but because she was in grade 4 and thus covered by the

(the "Baxter plaintiffs"), none of whom were named plaintiffs in the Cooper action, sought to testify regarding alleged acts of discrimination against them by the Bank. The defendant, however, objected to their testimony, urging the district court to rule that it would not resolve the merits of those "individual claims and that this evidence we hear just goes to their claim that there is a pattern and practice." The trial court agreed to so limit consideration of that testimony.^{2/}

On October 30, 1980, the district court issued a Memorandum of Decision which

1/ continued

trial court's finding of a pattern of discrimination against blacks in grades 4 and 5, she did not join as a plaintiff in the subsequent Baxter litigation.

2/ Trial Transcript, p. 400 (handwritten page number 340) (testimony of Sherri McCorkle.)

held that the Bank had engaged in a pattern and practice of discrimination in denying promotions to black employees in pay grades 4 and 5. (P.A. 194a). With respect to promotions of blacks in pay grades 6 and above, however, the court held:

There does not appear to be a pattern and practice pervasive enough for the court to order relief. (P.A. 194a).

The district court concluded that two of the named plaintiffs, Sylvia Cooper and Constance Russell, both of whom were in pay grade 6 or above, had been denied promotions on the basis of race. (P.A. 192a-193a). The court's October, 1980, opinion contained no reference to the testimony or discrimination claims of Baxter or any of the other Baxter plaintiffs. The court directed counsel for the plaintiffs to propose more detailed "findings of fact and conclusions of law con-

sistent with [its] findings." (P.A. 194a).

Undaunted by the failure of their initial attempt to obtain in the Cooper litigation a decision on the merits of the claims of the Baxter plaintiffs, counsel for plaintiffs tried another approach. The district court's decision contemplated the appointment of "a special master for a Stage II proceeding[] to ... identify class members entitled to relief." (P.A. 195a). But the court had found classwide discrimination against only blacks in pay grades 4 and 5, and the Baxter plaintiffs were in grades 3, 6 or 7. Thus a determination as to which blacks in grades 4 and 5 were the victims of discrimination would necessarily have left still unresolved the claims of the Baxter plaintiffs. Since those Baxter plaintiffs apparently could not be represented

by Cooper in the private class action, counsel for plaintiffs urged, in their Proposed Findings of Fact and Conclusions of Law, that the EEOC instead be permitted to press the claims of those employees at the stage II proceeding.^{3/} On February 27, 1981, however, the defendant filed a response strenuously objecting to this proposal.^{4/}

^{3/} Paragraph 27 of the Proposed Conclusions of Law read in part:

The Court is of the opinion ... that ... the Master should receive evidence and make recommendations with respect to Phyllis Baxter, Brenda Gilliam, Glenda Knott, Alfred Harrison and Sherri McCorkle.... They are within the scope of [the] individuals who have claims which may appropriately be pursued by EEOC.

This proposed Conclusion was not adopted by the trial court. See P.A. 283a.

^{4/} Defendant's Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law, pp. 8-10, 14, 18.

While this proposal for EEOC representation was still pending, counsel for plaintiffs made yet a third attempt to obtain in the Cooper litigation a resolution of the merits of the Baxter claims. On March 24, 1981, the Baxter plaintiffs moved to intervene as individuals in the Cooper litigation. (J.A. 39a-51a). The proposed complaint in intervention asserted that each of the Baxter plaintiffs had been denied a promotion as a result of racial discrimination, but did not allege that there was any general practice of discrimination against blacks in pay grades 6 and above. The defendant bank opposed this motion, insisting that if the Baxter plaintiffs wished to pursue their individual claims they could and should file a separate lawsuit.^{5/} The district court

^{5/} See pp. 57-58, infra.

agreed, and at a hearing on May 8, 1981, denied from the bench the motion to intervene;^{6/} the court also indicated that it would not permit the EEOC to represent the Baxter plaintiffs in the Cooper litigation.^{7/}

Four days later, on May 12, 1981, the Baxter plaintiffs, following the suggestion of the district court and the defendant, filed a civil action alleging racial discrimination in employment in violation of 42 U.S.C. § 1981. On May 29, 1981, the district judge entered a written order formally denying the motion to intervene in Cooper, emphasizing, "I see no reason why, if any of the would be intervenors are

^{6/} Transcript of Hearing of May 8, 1981, pp. 17-18. That decision was memorialized in an order of May 29, 1981. (P.A. 286a-289a).

^{7/} Transcript of Hearing of May 8, 1981, p. 19.

actively interested in pursuing their claims, they cannot file a Section 1981 suit next week...." (P.A. 291a). On the same day the judge issued his Findings of Fact and Conclusions of Law, which formally rejected the proposal to permit the EEOC to pursue in the Cooper litigation the claims of the Baxter plaintiffs.

Having thus succeeded in thwarting three different attempts to obtain in the Cooper litigation a resolution of the claims of the Baxter plaintiffs, the defendant Bank moved on July 2, 1981, to dismiss the Baxter claims, asserting that they were "barred by res judicata" because of the decision in Cooper. (J.A. 71a et seq.). On February 26, 1982, the district court denied the motion to dismiss. (P.A. 290a). The district judge, however, entered the findings necessary to permit the defendant to appeal from its

decision pursuant to 28 U.S.C. § 1292(a). The court of appeals granted the defendant leave to take such an appeal.

On January 11, 1983, the court of appeals reversed the district court's decision in Baxter. The Fourth Circuit did not suggest that the trial court had implicitly considered and resolved the conflicting contentions regarding the specific claims of the Baxter plaintiffs; it reasoned, rather, that the lack of a finding of classwide discrimination involving grades 6 and above barred as a matter of res judicata any consideration of the particular claims of blacks in those grades:

They ... are ... precluded by the determination of the District Court that there was no discrimination in promotion out of pay grades above pay grade 5.... (P.A. 179a).

One of the Baxter plaintiffs, Alfred Harrison, was in pay grade 3. Neither the

district court's Memorandum of Decision nor its Findings of Fact and Conclusions of Law even considered whether there was class wide discrimination regarding promotions out of grade 3. The court of appeals nonetheless held that Harrison's claim too was barred by res judicata. The district court had found a practice of discrimination in promotions from grades 4 and 5, and the court of appeals overturned that determination:

We ... reverse the District Court's Findings and Conclusions of class discrimination in promotions out of grades 4 and 5.... (P.A. 129a).

The court of appeals, nominally relying on this conclusion, held that Harrison's claim was

precluded by our determination on this appeal that there was no practice of discrimination in pay grade 5 and below. (P.A. 179a) (Emphasis added).

In fact the decision of the court of appeals on the class claims, like that of

the district court, referred only to grades 4 and 5, and was devoid of any discussion of whether there was classwide discrimination against blacks in pay grade 3. Upon consideration of the Baxter plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc, the panel's decision was upheld by an equally divided (4-4) court. (P.A. 188a).

SUMMARY OF ARGUMENT

I. The question presented by this case is not whether a judgment on the merits of a particular issue in a class action ordinarily precludes members of the class from relitigating that specific issue. Petitioners acknowledge the correctness of that principle. The problem here is to ascertain what the district court in fact decided.

II.(1) The district court in the Cooper litigation neither considered nor resolved the merits of the individual claims of the Baxter plaintiffs.

The trial in Cooper was a limited stage I proceeding whose purpose was to determine whether there was a practice of classwide discrimination. The district court concluded regarding discrimination in pay grades 6 and above that "there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief." (P.A. 194a). That finding does not preclude the possibility that there were particular acts of discrimination against the Baxter plaintiffs in grades 6 and above. This Court has repeatedly recognized that even in the absence of classwide discrimination there may be "isolated or 'accidental' or sporadic discriminatory acts.'" Teamsters v.

United States, 431 U.S. 324, 336 (1977).

The trial judge in Cooper repeatedly refused to consider and resolve the claims of the Baxter plaintiffs. When the Baxter plaintiffs sought to testify at the Cooper trials, the judge accepted a defense proposal that the court not "rule on individual claims." The district court refused to permit the EEOC to present the claims of the Baxter plaintiffs in the Cooper litigation, and rejected an attempt by the Baxter plaintiffs to actually intervene in Cooper. Thus the Baxter plaintiffs never had in Cooper "a 'full and fair opportunity' to litigate [their] claims.'" Kremer v. Chemical Construction Corp., 456 U.S. 461, 480 (1982).

The decision of the court of appeals appears to hold that the failure of the district court to decide the merits of the individual Baxter plaintiffs in the Cooper

class action somehow precludes the Baxter plaintiffs from bringing a second action. Such a rule would be inconsistent with the established principle that res judicata only bars claims previously resolved "on the merits." Kremer v. Chemical Construction Corp., 456 U.S. 461, 466 n.6 (1982).

(2) Res judicata does not apply where the judge who issued the first decision expressly reserved the right of the plaintiffs to bring a second action. At the hearing on the Baxter plaintiffs' motion to intervene in Cooper, the district judge announced:

I'm going to deny the motion without prejudice to the individual rights of the four would be intervenors to maintain a separate action. 8/

The court's written order denying that motion reiterated:

8/ See p. 60, infra.

I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week. (P.A. 288a).

Thus it was the clear intent of the district court in Cooper to permit the instant litigation.

The application of res judicata is particularly inappropriate since the defendant in Cooper expressly argued that Baxter could and should file her own lawsuit. In successfully opposing Baxter's motion to intervene in Cooper the Bank asserted:

Applicants ... can still go to the EEOC office and file all the charges they desire ... therefore, there is no way there will be any prejudice to the applicants in denying their motion, since they can pursue any individual claims they have in separate proceedings. 9/

9/ See p. 61, infra.

Less than two months after insisting in Cooper that the Baxter plaintiffs could and should file their own suit, the Bank moved to dismiss that suit, arguing that it was barred by res judicata.

III. The Baxter plaintiffs are barred by collateral estoppel from litigating only those issues which were actually decided in Cooper.

The Baxter plaintiffs in pay grades 6 and above are bound by the Cooper decision that any classwide discrimination in those grades was not sufficient to warrant a classwide remedy.

One of the Baxter plaintiffs, Alfred Harrison, is in pay grade 3. Since neither court below ever considered or decided whether there was classwide discrimination in pay grade 3, Harrison should be permitted to offer proof on remand of the

existence of such a pattern and practice of discrimination.

The district court found that there had been intentional discrimination against two named plaintiffs in Cooper, Sylvia Cooper and Constance Russell, both of whom were in pay grade 6 or above. The court of appeals reversed these findings of discrimination; the court of appeals, however, apparently misunderstood the district court to have held that there was no discrimination in grades 6 and above. Accordingly, the court of appeals' decision regarding the individual claims of Cooper and Russell should be vacated and remanded.

ARGUMENT

I. THE BINDING EFFECT OF DECISIONS IN CLASS ACTIONS

The question presented by this case is not whether a judgment determining on the merits a particular issue in a class action

ordinarily^{10/} precludes members of the class from relitigating that specific issue. Petitioners did not question that principle below and do not seek to do so here. The court of appeals, however, applied a far more sweeping rule, apparently assuming that an adverse determination on the merits of any single class issue precludes class members from litigating all other issues involving the same subject matter.

Prior to the 1966 amendments to Rule 23, there was in the case of a so-called "spurious" class action no procedure

^{10/} The application of this principle presupposes, inter alia, that the class was in fact certified, that class members received any required notice, that the named plaintiff adequately represented the interests of the class, and that the court rendering the decision had jurisdiction to do so. See 18 C. Wright and A. Miller, Federal Practice and Procedure, § 4455 (1972); 3B Moore's Federal Practice ¶ 2360 (2d ed. 1982).

for determining prior to judgment which of the potential members of the class claimed in the complaint were actual members and would thus be bound by the judgment. A number of courts held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefit of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. In order to prevent such "one-way intervention," sections (c)(1) and (c)(2) were added to Rule 23, directing that the propriety of class certification be resolved "as soon as practicable," and requiring class members in a Rule 23(b)(3) action to decide prior to any resolution on the merits whether to remain in the class. American Pipe Construction Co. v. Utah, 414 U.S. 538, 546-9 (1974). Rule 23(c)(3)

directs the court adjudicating a class action to include in its judgment a designation of the individuals who are members of the affected class.

Rule 23 does not, however, purport to "determine the binding effect of a judgment ... [or] prescrib[e] any particular adjudicatory effect to it...."^{11/} Rather, Rule 23 directs the attention of the court deciding a class action, and of any court subsequently called upon to ascertain the adjudicatory effect of that decision, to the actual language of the judgment. It is in the particular terms of the judgment that the first court is called upon to spell out what it has decided and who were the parties to that litigation, and it

^{11/} 7A C. Wright and A. Miller, Federal Practice and Procedure, § 1789, p. 177 (1972).

is by those terms that the res judicata effect of the judgment must be determined. In ascertaining what issues or claims cannot be litigated because of the decision in an earlier class action, "special care may be required in identifying the issues or claims presented and in relating them to the scope of the class action." 18 C. Wright & A. Miller, Federal Practice and Procedure, § 4455, p. 473 (1972)^{12/}

In a civil action on behalf of a single individual, one would ordinarily expect the plaintiff to present, and the court to resolve, all of his or her claims and contentions with regard to a

^{12/} See also F. James, Jr. & G. Hazard, Jr., Civil Procedure, § 11.28, p. 587 (2d ed. 1977) ("[T]he very nature of a class suit requires that the rules of res judicata be applied to it with special caution.")

particular subject matter or transaction. In certain instances an individual plaintiff may be required to do so. But in determining the scope of the decision in a class action the courts cannot indulge in any assumption that every possible claim against the defendant of each and every class member was in fact litigated and decided. A claim of a particular class member, or an issue or fact relevant to that claim, is not ordinarily adjudicated in a class action unless the claim or question is common to both the class and the named plaintiff, and unless that named plaintiff is in a position to "fairly and adequately protect the interests of the class." Rule 23(a). Rule 23(b) poses yet additional limitations regarding what claims and issues may in fact be litigated in a class action. "The mere fact that an aggrieved private plaintiff is a member of

an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer."

General Telephone Co. v. Falcon, 457 U.S. 147, 159 n. 15. (1982) (emphasis added) In sum, while an individual plaintiff ordinarily would not, and under some circumstances could not, pick and choose among the related claims and issues to present in a single lawsuit, "careful attention to the requirements of ... Rule ... 23" requires just such selectivity in the choice of questions to be resolved in a class action. East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 405 (1977).

Those matters which a court declines to actually resolve in a class action of course remain open for litigation in some future action. The same is true of issues

which counsel for the representative party, mindful of the requirements of Rule 23 and of the problems of manageability associated with any class action, declines to present or press for resolution. Falcon neither encourages nor requires the class representative to plead the broadest conceivable class claim and force the court to reduce it to a more manageable suit consonant with Rule 23. If the defendant in a class action believes that the membership of the proposed class or the scope of the proposed class claims are too narrowly defined, it is free to urge the trial court to expand or alter either. But a defendant dissatisfied with the class definition or the claims offered by a plaintiff cannot withhold its objection and later complain that other issues should have been litigated or that other individuals should have

been members of the class.^{13/}

Ascertaining precisely what issues were in fact litigated and resolved in a class action will not always be a simple task. The mere fact that a complaint alleges a wide variety of claims does not itself ensure that the representative party could or did in fact litigate all or most of them at trial. Cf. East Texas Motor

^{13/} "The basic effort to limit class adjudication as close as possible to matters common to members of the class frequently requires that nonparticipating members of the class remain free to pursue individual actions that would be merged or barred by claim preclusion had a prior individual action been brought for the relief demanded in the class action. An individual who has suffered particular injury as a result of practices enjoined in a class action, for instance, should remain free to seek a damages remedy even though claim preclusion would defeat a second action had the first action been an individual suit for the same injunctive relief." 18 C. Wright & A. Miller, Federal Practice and Procedure, §4455, p. 474 (1972).

Freight v. Rodriguez, 431 U.S. 395, 405-06 (1977). In some instances limitations on the claims or issues actually presented and resolved in a class action may be apparent on the face of the complaint itself. See, e.g., Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978) (individual action for damages not barred by earlier class action seeking only injunctive relief).^{14/}

The terms of the trial court's decision or order regarding certification may define the class issues more narrowly than the complaint itself. See e.g., Woodson v. Fulton, 614 F.2d 940, 942 (4th Cir. 1980) (certification decision excluded claims regarding discriminatory discharge). In

^{14/} In sustaining that individual action, the Fifth Circuit noted that it had "no way of knowing that [the earlier suit] would have been manageable as a class action if individual damage relief had been requested." 586 F.2d at 408.

the instant case, for example, the Cooper complaint alleged a general practice of discrimination on the basis of both race and sex (J.A. 15a), but the certification order limited the class claim to discrimination on the basis of race. (J.A. 27a). The scope of the issues or claims actually litigated at trial may be narrower still. See, e.g., Marshall v. Kirkland, 602 F.2d 1282, 1298 (8th Cir. 1979) (decision on class claim not res judicata as to class members whose claims were not in fact presented to the trial court). The opinion and judgment of the district court must be carefully scrutinized to ascertain whether each of the class claims or issues presented at trial was in fact resolved by the court on the merits.

The possibility that a trial court will not in fact resolve all the issues a plaintiff seeks to litigate is particularly

real when, as is often the case in Rule 23(b)(3) class actions, the court uses the familiar device of a split trial. See Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39, 47 (1967). Such bifurcated proceedings are particularly common in the trial court of complex Title VII class actions. In such cases

[a]t the initial, "liability" stage ... [the plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed.... [A] district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of the individual relief.... [T]he question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination.

International Brotherhood of Teamsters v.

United States, 431 U.S. 324, 360-62 (1977).

Should a trial court conclude in such a

case that there was no classwide discrimination, it would ordinarily have no occasion to consider at any later proceeding whether particular individuals might nonetheless have been the victims of isolated acts of discrimination. Just as the courts cannot assume that, if a class is certified, "all will be well for surely the plaintiff will win and manna will fall on all members of the class," General Telephone v. Falcon, 457 U.S. at 161, so too they cannot assume that every claim somehow relevant to the plaintiffs' complaint will in fact be litigated and resolved on the merits.

II. THE BAXTER CLAIMS ARE NOT BARRED
BY RES JUDICATA

(1) The District Court in Cooper Did
Not Decide The Merits of the
Baxter Claims

A final judgment on the merits of a claim precludes the parties, including

class members, from relitigating that claim. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). But this principle of res judicata does not apply to all cases in which a party fails to obtain the relief it sought in the initial litigation; only if that denial of relief was based on a decision on the merits of the claim is the unsuccessful party thereafter precluded from litigating the same claim. "If the first suit was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." Costello v. United States, 365 U.S. 265, 286 (1961); see Restatement of Judgments 2d, § 20 (1982). This Court has repeatedly declined to give such preclusive effect to decisions which failed to resolve the merits of a

disputed claim.^{15/} A finding that some earlier action did resolve the merits of a claim, like any application of res judicata, must be made "only after careful scrutiny." Brown v. Felsen, 442 U.S. 127, 132 (1979).

There is no question that the Baxter plaintiffs wanted and repeatedly attempted to litigate their individual claims in the Cooper action. It is equally clear, however, that the defendants successfully prevented them from doing so. Although the Baxter plaintiffs were permitted to testify at the Cooper trial, the defendant insisted that the district court not resolve their individual claims, but consider their testimony only insofar as it tended to

^{15/} Costello v. United States, 365 U.S. 765 (1961); Hughes v. United States, 71 U.S. (4 Wall.) 232 (1866); Gilman v. Rives, 35 U.S. (10 Pet.) 298 (1836).

establish the existence of classwide discrimination. This distinction was made when the first Baxter plaintiff was called to the stand:

[DEFENSE COUNSEL]: ... My understanding now is that, except for [Cooper and the three other named plaintiffs], you won't rule on individual claims and that this evidence we hear just goes to their claim that there is a pattern and practice.

* * *

THE COURT: ... I think the answer to your question is that is correct. The only people as to whose rights the Court has a duty to make a present decision are the four persons named who have themselves asserted in this case a personal right to recovery. 16/

Following the district court's initial Memorandum of Decision, which apparently precluded Cooper from representing the interests of the Baxter plaintiffs at the Stage II proceedings, counsel for plain-

16/ See n.2, supra.

tiffs suggested that the EEOC be permitted to present in those proceedings the individual claims of the Baxter plaintiffs. (See p. 9, supra). The defendant again objected:

The defendant submits that those witnesses are not entitled to participate in Stage II proceedings. The people in question testified at trial, but had not participated in the action other than as passive class members. Their testimony was on the issue of class liability, although their testimony focused on personal grievances. These people are not parties [and] they are not intervenors.... 17/

The trial court upheld the defendant's argument that the EEOC should not be permitted to pursue the Baxter claims. 18/

Finally, the Baxter plaintiffs attempted to intervene in the Cooper litigation in order

17/ Defendant's Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law, p. 8. (Emphasis in original).

18/ See p. 11, supra.

to present their individual claims for adjudication at the Stage II proceedings. The defendant successfully opposed this attempt as well. (P.A. 286a-289a). Far from having in Cooper "a 'full and fair opportunity' to litigate [their] claim," Kremer v. Chemical Construction Corp., 456 U.S. 461, 480 (1982), the Baxter plaintiffs in fact had no opportunity whatever to do so in that case.

It is also clear that the trial court did not in fact decide the individual claims of the Baxter plaintiffs. Phyllis Baxter, for example, alleged that on several occasions between 1975 and 1978 she applied for certain vacancies, "but was denied the positions beause of her race and color". (P.A. 66a). Plaintiff Gilliam contended that she was denied promotion to a junior Computer Console position in November of 1976 because of racial dis-

crimination. Plaintiffs Knott, Harrison and McCorkle made equally specific claims about denials of promotions to particular vacancies. (Id.) Neither the district court's Memorandum of Decision (P.A. 191a) nor the Judgment (P.A. 52a-62a) contain any reference whatever to Baxter, Gilliam, Knott, Harrison, or McCorkle. The lower court's Findings of Fact and Conclusions of Law describe the claims of the Baxter plaintiffs, noting that in general they were fully qualified for the promotions they sought and often more experienced than the whites who were actually appointed to the positions involved. (P.A. 247a-254a). But nowhere in the Findings is there the slightest suggestion that the trial judge had in fact reached any conclusion as to why the Baxter plaintiffs had been denied those particular promotions.

The Court of Appeals, however, believed that the claims of four of the five Baxter plaintiffs^{19/} were precluded by res judicata because of the district court's decision regarding classwide discrimination. At the time of trial these four plaintiff were in pay grades 6 or above, and both Cooper and the EEOC claimed and sought to prove that there was a general practice of promotional discrimination against blacks in those pay grades. The district court concluded that, other than regarding blacks in pay grades 4 and 5, "there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief." (P.A. 194a). This holding cannot plausibly be read as a decision that there had never been any discrimination against

^{19/} Baxter, Knott, Gilliam and McCorkle.

blacks above grade 5, or even that such discrimination had been particularly rare or unique. Since the district court in the same opinion also held that plaintiffs Cooper and Russell, both of whom were in grades 6 or above, "were discriminated against on account of their race" (P.A. 192a), its holding on the class claim cannot mean that there was no such discrimination in those grades. The only plausible construction of the court's decision is that acts of discrimination against employees in grades 6 and above were not sufficiently widespread to warrant a classwide remedy.

That the district judge's decision on classwide discrimination in grades 6 and above was not intended to resolve the particular individual claims of the Baxter plaintiffs, or of any other employees, was confirmed by the judge's subsequent

statements and orders. At the hearing on the application of the Baxter plaintiffs to intervene in Cooper, a question arose regarding whether the judge's prior decision on the class claim might somehow limit subsequent consideration of the individual claims. The trial court expressly rejected any such construction of its earlier decision:

I'm not ruling that their rights are barred -- their individual rights to make individual claims are barred by res judicata. You can have several people who may be entitled to recovery without that evidence proving that there had been a classwide discrimination. 20/

In its order denying intervention, the district court explained that its earlier opinion had merely "found no proof of any classwide discrimination above grade 5....." (P.A. 287a).

20/ Transcript of Hearing of May 8, 1981, p. 20.

The distinction drawn by the district court between proof of classwide discrimination and proof of individual acts of discrimination is fully supported by the decisions of this Court. In Teamsters v. United States, 431 U.S. 324 (1977), the Court held that proof of a pattern or practice of discrimination requires more than proof of "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." 431 U.S. at 336. General Telephone v. Falcon noted that there is a "wide gap" between the occurrence of an individual act of discrimination and existence of a classwide discriminatory practice:

Even though evidence that [a minority employee] was passed over for promotion when several less deserving whites were advanced may support the conclusion that [the employee] was denied the promotion because of his national origin, such evidence would not necessarily justify the additional

inference ... that this discriminatory treatment is typical of [the employer's] promotional practices....

457 U.S. at 157-58. This Court has consistently rejected efforts to treat the absence of classwide discrimination as if it were an affirmative defense to a claim of particular acts of discrimination. In Connecticut v. Teal, 73 L.Ed.2d 130 (1982), the Court explained:

[p]etitioners seek simply to justify discrimination against respondent on the basis of their favorable treatment of other members of respondent's racial group.... It is clear that Congress never intended to give an employer a license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees group.

73 L.Ed.2d at 141-42. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), emphasized that "[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." 438 U.S. at 579.

The lower courts have repeatedly recognized that proof that there is no classwide discrimination does not preclude the possibility that there may have been individual instances of discrimination. In Dickerson v. United States Steel Corporation, 582 F.2d 827 (3rd Cir. 1978), the employer advanced the same argument offered by respondent here, insisting that the dismissal of a classwide claim barred subsequent individual lawsuits by class members. The court of appeals rejected that contention:

The class claims were not examined as a mere aggregation of individual claims. ... Rather, the district court looked to statistical evidence offered to support the existence of a practice or pattern of discrimination.... The district court's finding of an absence of class-wide discrimination is not necessarily inconsistent with a claim that discrete, isolated instances of discrimination occurred.... Therefore, the court's decision as to the class-wide claims of discrimination does not, as a

matter of res judicata, bar class members from asserting individual claims of personal discrimination. 582 F.2d at 830-31.

See also Harrison v. Lewis, 559 F. Supp. 943, 947 (D.D.C. 1983); Branham v. General electric Co., 63 F.R.D. 667 671-71 (M.D. Tenn. 1974); 18 C. Wright & A. Miller, Federal Practice and Procedure, § 4455, pp. 473-74 (1982). Several circuits have considered or upheld claims of individual class members or representatives despite holding that the evidence did not support a finding of classwide discrimination.^{21/}

The distinction repeatedly recognized by this Court, and correctly applied by the district court in this case, does not recreate a situation similiar to the

^{21/} See, e.g., Muskelly v. Warner & Swasey Co., 653 F.2d 112 (4th Cir. 1981); Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980).

"one-way" intervention which existed prior to the 1966 amendments to Rule 23. The actual decision at a stage I proceeding binds the plaintiff class as well as the defendant, and that decision has a similar impact on both parties. If the plaintiffs prevail at stage I of a bifurcated Title VII hearing, the finding of a classwide discrimination does not result automatically in the entry of judgment for each class member. Rather, that decision merely creates a rebuttable presumption, applied at the stage II remedy hearing, that each class member was the victim of discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 357-62 and nn. 45-46 (1977). The employer remains free to attempt to overcome that presumption and to prove that any particular class member was not such a victim. Franks v. Bowman Transportation Co, 424

U.S. 747, 773 and n. 32 (1976). Conversely, a stage I finding of no classwide discrimination has an unquestionable and comparable adverse effect on any class member thereafter seeking to litigate an individual claim of discrimination. Such a class member would ordinarily be barred by collateral estoppel from seeking to support his or her individual claim by offering proof of a general pattern or practice of discrimination. Branham v. General Electric Co., 63 F.R.D. 667, 671-72 (M.D. Tenn. 1974); see pp. 63-67, infra.

The opinion of the court of appeals suggests an alternative basis for its decision -- that the Baxter plaintiffs, having unsuccessfully sought to have their claims adjudicated in the Cooper litigation, are not entitled to renew that effort in another lawsuit. Such a rule is implied by the following passage:

The plaintiffs seek to escape the bar created by the determination in the class action suit by arguing that they were prevented by the District Court in proving their individual claims in the class action trial. This argument would disregard the fact that the trial was bifurcated by agreement of the parties. (P.A. 179a-180a).

This argument seems to assert, and the bank appears to argue, that if the Baxter plaintiffs "lost" in Cooper in the sense that they merely failed to obtain a decision on the merits of their claims, such a "loss" precludes any further attempt to obtain a judicial determination of those claims.

Such a rule would be completely at odds with the long established principles of res judicata, which preclude litigation of only those claims previously resolved "on the merits". Kremer v. Chemical Construction Corp., 456 U.S. 461, 466 n. 6 (1982); Federated Department Stores, Inc.

v. Moitie, 452 U.S. 394, 398 (1981). In addition, such a rule would wreak havoc with the administration of Rule 23. Every class member would be forced to intervene to assure that his or her claim was not forfeited merely because a court failed to decide it. No competent plaintiff's counsel could ever again agree to the bifurcation of the trial of a class action, since bifurcation would carry with it an intolerable risk that the claims of class members would be lost merely because they were not resolved. In light of that danger, no conscientious district court, even at the urging of defense counsel, could ever order bifurcation.

The de facto abolition of bifurcation would impose an enormous administrative burden on the federal courts. The procedure expressly approved by this Court in Franks and Teamsters evolved, and has

gained widespread acceptance in Title VII class actions, because it greatly reduces the time needed to try such cases. As the lower courts are well aware, the trial of even a handful of individual claims of employment discrimination can be as time consuming as a trial to determine whether there is a classwide practice of discrimination affecting an entire plant. In the instant case, for example, the trial consumed a total of six days; of this period less than two days of testimony dealt with the class claim, and over four days of hearings concerned the individual claims of the named plaintiffs and several class members. Had each individual claim of every class member been presented, the trial would doubtless have lasted several months rather than a few days. A similar exponential growth in the length of all Title VII trials would be precipitated by

a rule that the failure of a court to find classwide discrimination at a stage I hearing automatically precludes litigation of all individual claims.

If such a rule was in fact applied by the court of appeals in this case, the notice actually sent to class members was fatally deficient. The notice advised class members

[T]he judgment in this case, whether favorable or unfavorable... will include all class members; all class members will be bound by the judgment or other determination of this action. (P.A. 36a)

The unambiguous meaning of this notice was that the claim of a class member would be lost only if there were in fact a "determination" of that claim, and if that determination were "unfavorable." Nothing in the notice in any way suggested that a class member would somehow be "bound" because the court did not issue any "judg-

ment or other determination" regarding his or her claim.

The decision of the court of appeals to dismiss the claims of petitioner Harrison did not rest on the district court's disposition of the claim of classwide discrimination in grades 6 and above. Since Harrison held only a grade 3 position, the district court's decision regarding promotions out of the higher grades was not controlling. Neither the district court's Memorandum of Decision, Findings of Fact and Conclusions of Law, or Judgment contain any reference whatever to whether or not there was a pattern of discrimination in promotions out of grade 3. In holding that Harrison's claim was barred by res judicata, the court of appeals asserted that that claim "is precluded by our determination on this appeal that there was no practice of discrimination in pay grade

5 and below." (P.A. 179a).

But the phrase "in pay grade 5 and below" masks a critical distinction between the actual decision of the Fourth Circuit and the nature of Harrison's claim. The issue in fact considered and resolved by the court of appeals was only whether the district court erred in finding discrimination in promotions from grades 4 and 5; the district court made no finding about, and the court of appeals had no occasion even to consider, promotion practices affecting black employees in grade 3. It is clear that the court of appeals well understood that the only issue of classwide discrimination before it involved grades 4 and 5. In twelve different passages the court of appeals described the district court's finding of classwide discrimination, in every case noting that that finding concerned grades 4

and 5.^{22/} In the course of analyzing the evidence bearing on whether there was classwide discrimination, the court of appeals repeated on more than thirty occasions that the issue before it was the sufficiency of the evidence regarding grades 4 and 5,^{23/} emphasizing at one point, "[w]e are concerned solely with alleged discrimination in pay grades 4 and 5." (P.A. 99a). The appellate court's actual conclusion regarding classwide discrimination is equally unambiguous:

[A] finding of either a prima facie case or of a pattern of class dis-

^{22/} P.A. 7a, 15a, 25a, 26a, 27a, 28a, 34a, 55a, 104a, 123a, 124a n.40, 129a.

^{23/} P.A. 29a, 30a, 35a, 36a, 37a, 38a, 55a, 57a, 58a, 59a, 61a, 62a, 64a, 65a n.24, 70a, 71a, 72a, 77a, 78a, 79a, n.26, 80a, 82a, 93a, 99a, 103a, 104a, 105a, 108a, 110a, 111a, 113a, 114a, 116a, 117a, 122a, 124a, 126a, 127a, 128a.

crimination in promotions out of pay grades 4 and 5 or a Finding of Fact of such a pattern is not supported by any substantial evidence..... We accordingly reverse the District Court's Findings and Conclusions of class discrimination in promotions out of pay grades 4 and 5.... (P.A. 128a-129a).

Nowhere in the appellate opinion is there the slightest suggestion that the panel was considering, or even aware of, any allegation in Cooper of classwide discrimination in promotions out of pay grade 3.^{24/} Accordingly, nothing in that record can in any way foreclose consideration of Harrison's claim in the Baxter litigation.

- (2) The District Court in Cooper Expressly Reserved the Right of the Baxter Plaintiffs to Bring This Litigation

^{24/} The few references in the court's opinion to pay grade 3 contain no suggestion that the court believed there was any such allegation. (P.A. 3a, 30a, 37a, 98a, 118a, 153a).

The procedural history of this case presents an additional basis for rejecting the defendant's contention that the decision in Cooper requires dismissal of the complaint in Baxter. In opposing the attempt of the Baxter plaintiffs to intervene in Cooper, the defendant insisted that intervention was simply unnecessary since the Baxter plaintiffs were free to file their own lawsuit. In the Defendant's Response to Motion to Intervene, the bank argued:

[A]pplicants ... can still go to the EEOC office and file all the charges they desire.... Therefore, there is no way there will be any prejudice to the applicants in denying their motion, since they can pursue any individual claims they have in separate proceedings. (P.4)

At the oral argument on that motion in the district court, the defendant reiterated this contention:

COURT: Mr. Hodges [counsel for defendant], are you saying that they could bring a separate suit within whatever the time would be following the dismissal of this case?

MR. HODGES: I believe they could if they wanted to pursue their individual claims and if the statute was tolled and whatever was not barred by the statute of limitations, then they could pursue separately....

* * * *

MR. HODGES: ... [T]hey could go file charges with the EEOC, file a case under 1981, but they could not participate any longer in this case. They are not entitled simply to go into Stage 2 to pursue their claims. They've got to do what any other Plaintiff with a complaint has got to do and that is go through the proper procedure.

* * * *

MR. HODGES: If they've got individual claims, let them file it. Let them go through the proper procedures.^{25/}

A mere 55 days after thus insisting that the Baxter plaintiffs could and should file their own suit, the defendant moved to dismiss that lawsuit as barred by res judicata.^{26/} In the court of appeals the defendant expressly disavowed the position it had taken in Cooper, explaining "The Bank did at the time erroneously assert that individual claims could be pursued."^{27/} But having thus prevented the Baxter plaintiffs from litigating their claims in Cooper, the bank was necessarily

^{25/} Transcript of Hearing of May 8, 1981, pp. 7, 8, 16.

^{26/} J.A. 71a. The defendant's Motion to Dismiss was filed in Baxter on July 2, 1981.

^{27/} Reply Brief of Appellant, No. 82-1259 (4th Cir.), p. 2.

estopped from opposing the filing of the separate lawsuit which the bank itself had advocated.

The argument advanced by the bank in opposing the motion to intervene was expressly adopted by the district court in denying intervention. During the argument on that motion the district judge made clear that his decision in Cooper left the Baxter plaintiffs free to file a new action:

COURT: Mr. Hodges is agreeing with [the plaintiffs] that ultimately they can all come in here. He says they are entitled to have the EEOC function in their cases before they have a standing to be in this case, and I think he's right.

* * * *

COURT: I'm going to deny the motion without prejudice to the individual rights of the four would be

intervenors to maintain a separate action or to file a separate claim....

MR. CHAMBERS [counsel for plaintiffs]: Your Honor, would that without prejudice be also with respect to their rights under 1981, because we will move tomorrow morning for a separate lawsuit.

COURT: Sure, without prejudice to any rights they have under 1981 or under the Equal Employment Act.28/

The district court's order denying intervention emphasized:

I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week. (P.A. 288a).

28/ Transcript of Hearing of May 8, 1981, pp. 12, 17-18. (Emphasis added).

The district judge's decision is by itself dispositive of the res judicata defense. Res judicata is never applicable if a plaintiff's claim in an earlier action was rejected "without prejudice,"^{29/} or if the court in the first action expressly reserved the plaintiffs right to maintain a second action.^{30/}

^{29/} Restatement of Judgments, Second, §20(1)(b): "A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim ... (b) when ... the court directs that the plaintiff be nonsuited (or that the action be otherwise dismissed) without prejudice...." (1982).

^{30/} Restatement of Judgments, Second, §26(1)(b): "(1) When any of the following circumstances exists, the general rule .. does not apply to extinguish the claim and ... the claim subsists as a possible basis for a second action by the plaintiff against the defendant: ... (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action...." (1982).

III THE APPLICATION OF COLLATERAL
ESTOPPEL TO THIS CASE

Although the rejection of a claim of classwide discrimination does not preclude the subsequent litigation of claims of individual class members, it will ordinarily restrict the evidence and issues on which such subsequent litigation may be based. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). As with res judicata, of course, the bar of collateral estoppel must be applied with care. "It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided

in the first proceeding and where the controlling facts and applicable legal principles remain unchanged." Commissioner v. Sunnen, 333 U.S. 591, 599-600 (1948).

"If there be any uncertainty on this head in the record -- as, for example: if it appear that several distinct matters may have been litigated ... without indicating ... upon which the judgment was rendered -- the whole subject matter of the action will be at large...." Russell v. Place, 94 U.S. 606, 608 (1876).

With regard to petitioner Harrison, it is clear that nothing was litigated or decided in the Cooper litigation regarding whether or not the bank engaged in a pattern and practice of discriminating against blacks in promotions out of pay grade 3. Harrison should thus be free on remand to seek to prove, in support of his

individual claim, that such a pattern and practice existed.

The other Baxter plaintiffs, who are in pay grades 6 and above, are bound by the trial court's decision in Cooper that any pattern or practice of discrimination in those grades was not "pervasive enough for the court to order relief." But while it is apparent that this passage did not adjudicate the individual claims of any of the Baxter plaintiffs, it is unclear how widespread or uncommon the district court actually concluded discrimination was in those pay grades. A frequency of discrimination insufficient to justify classwide relief might still be adequate to provide significant evidentiary support for individual discrimination claims. Since the Baxter claims are to be tried by the same judge who decided Cooper, the district court will be in a position on remand to

resolve, based on the intended meaning of the original Cooper decision, the extent to which the Baxter plaintiffs may introduce, in support of their individual discrimination claims, evidence of alleged acts of discrimination involving other black employees in pay grades 6 and above.

The district court in this case found that the bank had engaged in intentional racial discrimination in denying promotions to two of the named plaintiffs, Sylvia Cooper and Constance Russell. (P.A. 192a-193a). It concluded in particular that Cooper, who was in pay grade 7, had been unlawfully denied a promotion to grade 8, while Russell, a grade 6 employee, had been illegally rejected for a promotion to grade 7. The court of appeals reversed both of these findings of discrimination. (P.A. 129a-171a). But the opinion and panel which overturned those findings also

erroneously assumed, as is apparent from the discussion of the Baxter plaintiffs, that the trial court had found there was no discrimination at all at the bank in grades 6 and above. The court of appeals' misreading of the district court's holding on the question of classwide discrimination in grades 6 and above necessarily tainted its rejection of the claims of Russell and Cooper that they were discriminatorily denied promotions out of grades 6 and 7 respectively. Accordingly, the Fourth Circuit's decision dismissing the claims of Cooper and Russell should be vacated and remanded for reconsideration in light of the correct construction of the trial court's decision on the classwide claims.

CONCLUSION

The judgment and opinion of the Fourth Circuit, insofar as they hold that the claims of the Baxter plaintiffs are barred

by res judicata, should be reversed. The judgment and opinion regarding plaintiffs Cooper and Russell should be vacated and remanded for further consideration in light of this Court's opinion.

Respectfully submitted,

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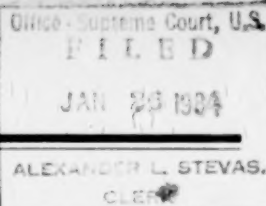
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

SYLVIA COOPER, *ET AL.*,
Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

and

PHYLLIS BAXTER, *ET AL.*,
Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF FOR RESPONDENT
FEDERAL RESERVE BANK OF RICHMOND**

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QUESTION PRESENTED

Whether a judicial determination in a properly certified class action will bind a class member, not opting out after notice, in asserting thereafter an individual claim within the range of charges determined in the class suit.¹

¹ The parties have stated the issue in this case in various ways. The statement above is that of the Fourth Circuit in its decision below. [P.A. 177a].

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ABBREVIATIONS

The following abbreviations are used in citation to various parts of the Record in this action:

"J.A." refers to the Joint Appendix filed in this Court

"P.A." refers to the Appendix to the Petition for Writ of Certiorari

"I C.A. App." refers to the Appendix in *EEOC and Cooper* in the court of appeals

"II C.A. App." refers to the Appendix in *Baxter* in the court of appeals

"Tr." refers to pages in the trial transcript in *EEOC and Cooper* which were not made part of the Appendix in that action in the court of appeals

"PX" refers to plaintiffs' exhibits in the trial record of *EEOC and Cooper*

"DX" refers to defendant's exhibits in the trial record of *EEOC and Cooper*

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STATEMENT OF THE CASE

This action arises out of a race discrimination in employment class action, *EEOC and Sylvia Cooper, et al. v. Federal Reserve Bank of Richmond*. The action was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and pursuant to 42 U.S.C. § 1981. The Respondent is the Federal Reserve Bank of Richmond, Charlotte (North Carolina) Branch (hereinafter "the Bank"). At all times relevant to this action blacks represented over 30% of the Bank's workforce — fifty percent greater than their representation in the relevant external labor market (about 20%). [P.A. 118a]. Moreover, the Bank promoted blacks at a rate greater than their representation in its workforce and at a greater rate than whites were promoted. [P.A. 121a]. The final judgment on the merits of the class action was in favor of the Bank.

Petitioners in this court were the plaintiffs in *Baxter, et al. v. Federal Reserve Bank*. They are all former class members in the *EEOC and Cooper* class action. After an adverse ruling as to their sub-class by the district court in the *EEOC and Cooper* action, they filed individual claims in the subsequent *Baxter* action. The Fourth Circuit Court of Appeals held that those claims were barred by the judgment in favor of the Bank in the class action.

The *EEOC and Cooper* action was initiated by the EEOC in March 1977. The EEOC's Complaint alleged race discrimination in promotions in general and race and sex discrimination against Cooper in particular. [J.A. 6a]. Several months later Cooper and three others intervened in the EEOC's action for themselves and as representatives of the class of all present and former employees of the Federal Reserve Bank of Richmond, Charlotte Branch. The Complaint-in-Intervention alleged racial discrimination against the four class representatives and against the class in initial job assignment, training, pay, discipline and promotion in all job grades. [J.A. 12a]. The Bank did not oppose this intervention.

In April 1978, the class was certified by the district court pursuant to a Consent Order agreed upon by all the parties. [J.A. 24a]. By this Consent Order, the class represented by the Cooper intervenors was certified to include "all black persons who worked for the Federal Reserve Bank of Richmond at its Charlotte Branch Office at any

time since January 3, 1974." [J.A. 30a]. The EEOC was not certified as a class representative, but agreed that the scope of the persons for whom it sought relief for race discrimination was co-extensive with the definition of the class represented by the Cooper intervenors. [J.A. 31a].

By the Consent Order the parties also agreed upon a Notice to be sent to class members. [J.A. 30a-31a]. The Notice advised class members of the class action, their membership in the class, their right to remain class members or to opt out of the class, and the consequences of each option. Specifically, the Notice advised class members that:

If you decide to remain in this action, you should be advised that: the court will include you in the class in this action unless you request to be excluded from the class in writing; the judgment in this case, whether favorable or unfavorable to the plaintiff and the plaintiff-intervenors, will include all members of the class; all class members will be bound by judgment or other determination of this action. . . .

That Notice was received by each of the *Baxter* Petitioners. [J.A. 95a]. None of these Petitioners made any attempt to opt out of the class action.

After extensive discovery, the *EEOC and Cooper* class action was tried to the district court in September 1980. The trial of the class action was bifurcated upon consent of the parties. The major issue at the trial was alleged discrimination in promotions. Petitioners each testified at the trial in support of the class action about various promotions which they allegedly had been denied. But they never moved to intervene, even after the district court ruled that it would hear their testimony only on the class issues.

Shortly after the trial, the district court issued a "Memorandum of Decision." [P.A. 91a]. The Memorandum of Decision stated the district court's opinion that that the Bank had discriminated against two of the four individual claimants (Sylvia Cooper and Constance Russell) and in promotions out of Grades 4 and 5 only, but no relief relating to promotions out of Grades 6 and above was indicated.

Petitioners were employed in Grades 6 and above² and, therefore, were not members of the class which was awarded relief (*i.e.* blacks denied promotions out of Grades 4 and 5). Four months after the filing of the Memorandum of Decision, Petitioners sought to intervene in the class action. [J.A. 39a]. Intervention was denied. [P.A. 286a]. Petitioners then filed a separate action alleging individual claims of discrimination. [J.A. 63a]. The Bank moved to dismiss that action. [J.A. 71a]. The Motion was denied, but the district court certified the question for interlocutory appeal. [J.A. 96a]. The district court's Findings of Fact and Conclusions of Law in *EEOC and Cooper* were filed May 29, 1981. [P.A. 197a]. There the district court defined the class as it had in the Consent Order and concluded with respect to promotions in Grades 6 and above as follows:

The Court concludes that there was no showing that the Bank had discriminated against black employees with respect to promotions out of Grades 6 and above, and that defendant did not violate Title VII or 42 U.S.C. §1981 with respect to promotions out of Grade 6 and above.

[P.A. 284a-285a].

The Bank appealed those portions of the *EEOC and Cooper* judgment that were adverse to it and also appealed the district court's refusal to dismiss the *Baxter* action. Neither the EEOC nor the plaintiff-class representatives appealed from the portions of the judgment adverse to them.

On appeal, the Fourth Circuit held in *EEOC and Cooper* that the district court's findings of discrimination against two of the named individuals and in promotions out of Grades 4 and 5 were clearly erroneous. [P.A. 2a-172a]. In *Baxter*, the Fourth Circuit held that the adverse judgment in the *EEOC and Cooper* class action barred the subsequent individual action. [P.A. 172-184a].

² Petitioner Ruffin was actually a Grade 5 employee [P.A. 246a-247a], and thus at the time of the Motion to Intervene she was entitled to participate in Stage II of the class action.

SUMMARY OF ARGUMENT

I. The Fourth Circuit Court of Appeals properly ruled that Petitioners are bound by the adverse judgment in the prior class action. After notice of their right to pursue their claims individually or to be bound by the judgment in the class action, Petitioners elected to litigate their claims through the *Cooper* class representatives and the vehicle of the class action. Petitioners made no attempt to litigate their claims individually until after they learned that the judgment in the class action was adverse to them. Rather, they abided by their election and pursued their claims as class members in the class action through a decision on the merits. Consequently, they are bound by that election and the adverse judgment in the class action.

The class action included the claims of racial discrimination in promotions and resolved those claims against Petitioners' class. The fact that the class action was a "pattern and practice" action is immaterial to *res judicata* principles because "pattern and practice" is simply an alternative method of proof, not a separate and distinct cause of action. Petitioners' subsequent action involves the same cause of action that was resolved in the prior class action. So, it was properly barred by the doctrine of *res judicata*.

The language and intent of Fed. R. Civ. P. 23 also requires that the subsequent action be dismissed. The class action is specifically designed for the adjudication in one action of "individual claims" which are typical of one another and involve common questions of law or fact. In fact, a class action is nothing but the aggregation of the "individual claims" of class members. Here, the district court found—upon Petitioners' consent—that the class action was superior to other available methods for fair and efficient adjudication of the controversy. Consequently, the action was certified as a class action pursuant to Rules 23(b) (2) and (b) (3). This Court noted in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547-48 (1974), that Rule 23 was specifically amended in 1966 to bind class members to the judgment in a class action and to prevent such fence-sitting or "one-way intervention" as Petitioners attempt here.

The practical effect of the rule suggested by Petitioners would destroy Rule 23 and the class action as a litigation vehicle. If these Petitioners were permitted to file subsequent actions, then so could

all the 300 or so other class members. That would result in the Bank — after prevailing on the merits in the class action — having to defend multiple subsequent actions by former class members. Petitioners seek a rule that would permit them to participate in the class action and: (i) if they prevailed, obtain a presumption in their favor; and (ii) if they lost in the class action, nonetheless maintain a subsequent action on their “individual claims.” Petitioners’ submission is, in effect, that a class action amounts to a “no lose” proceeding for class members and a “no win” proceeding for the defendant. Such a result would render Rule 23 and the class action meaningless.

Finally, there are many benefits that a class member receives by litigating his claims in the class action — an increased chance of success and economies of scale resulting from pooled resources. But, those benefits are not totally one-sided. They involve a trade-off borne of judicial economy. That is, if the class action device is to succeed in avoiding needless multiplicity of suits and to permit adjudication of numerous claims in one suit, the judgment in the class action must be binding on class members.

II. The district court did not expressly reserve Petitioners’ subsequent actions in ruling on their post-trial Motion to Intervene. At most, the district court stated an opinion that Petitioners could file a subsequent action — an erroneous opinion which was reversed by the Fourth Circuit. Moreover, at the time of Petitioners’ Motion to Intervene in *EEOC and Cooper* and the district court’s statements, the court had already ruled against Petitioners’ class, so the Bank was then entitled to a judgment against Petitioners.

III. Petitioner Harrison was actually a Grade 6 employee and not a Grade 3 as mistakenly noted by both courts below. Consequently, his position is no different than that of the other Petitioners.

IV. The rule that this Court should adopt is that: a properly certified class action is made up of the “individual claims” of class members, and those class members who, after notice, elect to litigate their claims in the class action are thereafter precluded from re-litigating individual claims within the range of issues determined in the class action. Consequently, the decision of the Court of Appeals for the Fourth Circuit should be affirmed.

ARGUMENT

I. The Fourth Circuit Properly Ruled That Petitioners Are Bound By The Adverse Judgment In The Prior Class Action

The Bank submits that *res judicata* bars Petitioners' claims in the subsequent *Baxter* action. Petitioners knowingly elected to litigate their "individual claims" of discrimination through the vehicle of the *EEOC and Cooper* class action. They are therefore bound by the judgment in that action and precluded from pursuing the claims which they attempt to re-litigate in this subsequent action. Their subsequent action is also barred by the language and intent of Fed. R. Civ. P. 23. Binding Petitioners to their election is particularly appropriate here because they are classic "fence sitters" who seek in the *Baxter* action a second chance to litigate their claims. Finally, the practical effect of Petitioners' submission would be to render Rule 23 and the class action meaningless.

1. *Res Judicata*

The doctrine of *res judicata* provides that a "final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action." *Federated Department Stores v. Moitie*, 452 U.S. 394, 398 (1981); see also *Nevada v. United States*, 77 L. Ed. 2d 509 (1983); *Allen v. McCurry*, 448 U.S. 90 (1980). Whether Petitioners' claims are barred by *res judicata* turns on whether the cause of action asserted in the *EEOC and Cooper* class action was the "same cause of action" that Petitioners seek to assert here. *Nevada v. United States*, 77 L. Ed. 2d at 525.

The test for whether a subsequent action is barred by *res judicata* does not center on the *evidence* presented. Rather, it focuses on the violation of a *right* which the evidence shows. This Court has stated the analysis as follows:

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination,

is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action.

Balto. Steamship Co. v. Phillips, 274 U.S. 316, 321 (1927) (Emphasis added), cited with approval, *Nevada v. United States*, 77 L. Ed. 2d at 525 n.12.

In the present case, the individual claims of each Petitioner stated in their Complaint relate solely to their failure to receive certain promotions. [J.A. 65a-66a]. The denial of these promotions is precisely what each Petitioner previously testified about in the trial of the class action. [I C.A. App. 452-688]. Similarly, the violation of the *right* is the same as in the prior class action—alleged denial of promotions because of their race. That is precisely the “right” that was litigated in the *EEOC and Cooper* class action and resolved against Petitioners. Consequently, this subsequent action is barred by principles of *res judicata* and the binding effect of the class action judgment.

Petitioners concede that a class action judgment on the merits of an issue precludes re-litigation of that issue. But, they attempt to escape that principle by asserting that the *EEOC and Cooper* class action did not include the individual claims of Petitioners. The Bank submits that: (a) the pattern and practice issue in the class action encompassed Petitioners’ individual claims and, thus, their subsequent action involved the “same cause of action” and is barred by *res judicata*; and (b) the prior class action involved the issue of discrimination in promotions and concluded in the district court with a determination that the Bank had not discriminated against Petitioners’ class in promotions.

a. The “Same Cause of Action”

A class member’s “individual claims” are encompassed in the class action and thus represent the “same cause of action” and may not be re-litigated.

Several circuit court decisions have established this rule. In *Kemp v. Birmingham News Co.*, 608 F.2d 1049 (5th Cir. 1979), the plaintiff sought to raise personal claims for harassment and demotion

in an individual action after entry of a consent decree in a class action in which he was a non-named class member. The Fifth Circuit held the plaintiff bound by the class action decree. There the issues in the class action involved a "system" of "limiting the employment and promotional opportunity" of class members. 608 F.2d at 1052. The Fifth Circuit noted that since the plaintiff's claims arose prior to entry of the judgment in the class action and "were or could have been brought" before the court in the class action, the *same cause of action* was involved and the plaintiff was bound by the prior class action decree. 608 F.2d at 1053.

A companion case, *Fowler v. Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979), confirms *Kemp*, but also adds an additional feature. Like Petitioners, Fowler complained that he had been denied promotions and passed over for supervisory positions. Also similar to this case, Fowler was not entitled by the class action decree to all of the relief that other class members had obtained. Nevertheless, his personal claims were barred by the prior class action decree because they were within the scope of the general issues resolved in the class action.

The Ninth Circuit has also followed *Kemp* in affirming the dismissal of a plaintiff's claims arising from incidents that occurred prior to settlement of a class action in which the plaintiff has been a class member. *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981). There, the plaintiff's personal claims of denial of promotions were barred by the decree in the prior class action which settled the issue of classwide denial of "employment opportunities." But, other claims of retaliation that were not part of the classwide allegations in the prior class action were not dismissed. 656 F.2d at 1298-99.

The Fourth Circuit has also recognized this principle in two decisions preceding this case: *Woodson v. Fulton*, 614 F.2d 940 (4th Cir. 1980) (class action consent decree involving issues of discrimination in hiring, discipline and promotion barred class member's subsequent individual action on issues of his personal discrimination discipline and hindrance of advancement, but not his claim relating

to discharge not included in the class action); *Dalton v. Employment Security Comm'n*, 671 F.2d 835 (4th Cir.), *cert. denied*, 74 L. Ed. 2d 117 (1982), (consent decree barred subsequent individual action on issues subject to the decree).³

Dicta in *Dickerson v. United States Steel Corp.*, 582 F.2d 827 (3d Cir. 1978), states that class members in an unsuccessful class action *may* re-litigate their personal claims in a subsequent individual action. That decision is directly contrary to *Woodson*, *Dalton*, *Kemp*, *Fowler* and *Dosier*,⁴ and by implication has been tacitly rejected by those decisions which occurred subsequent to its publication. Moreover, as the Fourth Circuit noted here, the *dicta* in *Dickerson* was subsequently rejected by the Third Circuit *en banc* in *Crocker v. Boeing Co.*, 662 F.2d 975, 997 (3d Cir. 1981). There the

³ The EEOC contends that this line of decisions merely "effectuate[s] the salutary policy against double recovery." [EEOC Br. at 12 n.14]. In fact, *Kemp*, *Fowler*, *Dosier*, *Woodson* and *Dalton* make no mention of the prospect of "double recovery." Rather, each decision held that the doctrine of *res judicata* barred class members' subsequent claims and that the class action involved the same cause of action raised by a class member in a subsequent suit. See, e.g., *Woodson*, 614 F.2d at 941-42; *Kemp*, 608 F.2d at 1052-53; *Dosier*, 656 F.2d at 1298-99.

⁴ Petitioners cite several cases as also being contrary to the cases discussed above. Each case involves a defect not present here and is distinguishable from the cases discussed above: In *Bogard v. Cook*, 586 F.2d 399, 408 (5th Cir. 1978), a subsequent individual action was permitted because it alleged acts directed at the plaintiff *after* the record in the class action had been closed and it sought damages for specific acts of physical abuse which were not included in the prior class action and which sought only equitable relief from general prison conditions. In *Marshall v. Kirkland*, 602 F.2d 1282, 1298 (8th Cir. 1979), a subsequent action was permitted because there had been no notice to class members regarding the class action. Finally, in *Eastland v. T.V.A.*, 704 F.2d 613, *modified in part*, 714 F.2d 1066 (11th Cir. 1983), involved only consolidation for trial with the class action of the individual claim of a purported class representative who had been found not to be an adequate class representative.

court dismissed as barred by *res judicata* two individual claims "because they were not named plaintiffs but rather were class-member witnesses whose class-wide claims had been unsuccessful" in the earlier class action (just as Petitioners here).⁵

The EEOC and Petitioners contend that a "pattern and practice" claim of discrimination is a different cause of action than an individual suit under Title VII or 42 U.S.C. § 1981. In fact these are no more than two methods of proving the same fact: whether a particular employment decision was racially premised. *Teamsters v. United States*, 431 U.S. 324, 335 (1977). In *Teamsters* this Court rejected the assertion that a Title VII plaintiff could carry the burden of proof only by presenting evidence according to the standards of *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), and stated that "[t]he facts necessarily will vary in Title VII cases, and the specifications ... of the *prima facie* proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations." *Teamsters*, 431 U.S. at 358, citing *McDonnell-Douglas*, 411 U.S. at 802 n.13. Accordingly, the bifurcated trial of "pattern and practice" discrimination merely "illustrates *another means* by which a Title VII plaintiff's initial burden of proof can be met." *Teamsters*, 431 U.S. at 359 (Emphasis added). Simply because a "pattern and practice" method of proof differs from the elements of a *McDonnell-Douglas* method of proof does not create two causes of action. The injury alleged is the same, the statutes under which the cause of action arises are identical, and the ultimate issue adjudicated by the court does not differ, regardless of the method of proof.

In fact, a "pattern and practice" class action is by its nature an aggregation of the "individual claims" of each of the class members. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980). In a private class action there is nothing involved *but*

⁵ In *Edwards v. Boeing-Vertol Co.*, 717 F.2d 761 (3d Cir. 1983), a panel of the Third Circuit permitted a subsequent action by an unsuccessful class member under principles of tolling. A Petition for Certiorari is presently pending in this Court in that case.

individual claims. A class action is not a separate cause of action itself. Without the individual claims there would be nothing to litigate in the class action. This is particularly true in a disparate treatment action which alleges a "pattern and practice" of discrimination, such as this case. Such an action attempts to show that discrimination is "the regular rather than the unusual practice." *Teamsters v. United States*, 431 U.S. at 336. So, the "pattern and practice" attempted to be demonstrated consists of an aggregation of separate, distinct promotion decisions involving numerous individuals — not an additional substantive cause of action.

The incongruity of the Petitioners' position is easily demonstrated. Under Title VII and 42 U.S.C. § 1981, an individual plaintiff can carry his burden of proof of discrimination either by demonstrating that the employer engaged in a "pattern and practice" of discrimination or by introducing evidence in accordance with the pattern of *McDonnell-Douglas* and its progeny. *Teamsters*, 431 U.S. at 359. A Title VII plaintiff who filed an individual action alleging a pattern and practice of discrimination, of which he was a victim, would surely be bound by an adverse determination in his individual suit. He would not be able to file a second lawsuit that alleged again that he had been discriminated against, but that this time his evidence would be presented in accordance with the pattern of *McDonnell-Douglas*. An individual possesses only one cause of action under Title VII and 42 U.S.C. § 1981, but he has two different ways of proving his cause of action. *Teamsters v. United States*, 431 U.S. at 359; *see also*, *Coe v. Yellow Freight Systems, Inc.*, 646 F.2d 444, 449 n. 1 (10th Cir. 1981). He may decide to pursue one method of proof rather than the other, but he cannot splinter his cause of action into different lawsuits and continue to attempt to prove the same injury under different theories in different lawsuits.

This conclusion does not change simply because a Title VII plaintiff has pursued a pattern and practice claim as a class member of a class action suit. The mere fact that he was a member of a class action which litigated a "pattern and practice" action does not splinter his cause of action into two causes of action, one for a "pattern and practice" and one for individual acts of discrimination pursuant to the pattern of *McDonnell-Douglas*.

Thus, an individual's cause of action for racial discrimination is procedurally indistinguishable for *res judicata* purposes from a classwide cause of action for discrimination. Both the individual and class claims vindicate the same right and focus on the same issue: whether the employer has discriminated against an employee on the basis of race.⁶

Here, there can be little doubt that these Petitioners' promotion claims were encompassed within the allegations of classwide discrimination in promotions in the class action. Their claims stated in their Complaint in the *Baxter* action [J.A. 63a] relate to the denial of various promotions to each Petitioner. Denial of promotions was the primary issue litigated and decided in the class action. Virtually all of the trial in *EEOC and Cooper* was directed to the promotion issue. Plaintiffs offered over fifty statistical exhibits directed to the promotion issue. [PX 34-37, 34a-37a, 114a-114tt]. Moreover, Petitioners each testified at the trial in support of the class action, and their testimony concerned the denial of the very promotions they now allege in the *Baxter* Complaint.⁷ This class action clearly litigated and decided the issue of discrimination in promotions. Consequently, the subsequent *Baxter* action involves the "same cause of action" decided in the *EEOC and Cooper* class action. So, relitigation of the "individual claims" is barred by *res judicata*.

⁶ Although the issue presented here happens to arise in a discrimination suit, it is not peculiar to that type of action. The issue here is of general procedural applicability. It would be present in antitrust, securities, and consumer class actions—in fact, it would be present in *any* class action.

⁷ Petitioners' reliance on the district court's Findings relating to their testimony [Pet. Br. 39] is misplaced. Those "findings" were prepared by plaintiffs' counsel and adopted by the district court apparently without critical review. [P.A. 13a-24a]. Therefore, they suffer the same flaw as other such Findings criticized by the Fourth Circuit and found to be clearly erroneous. In fact, their "findings" are merely a summary of Petitioners' assertions and they completely ignore the ample rebuttal evidence offered by the Bank.

b. *The Decision of the District Court*

Petitioners contend that the judgment of the district court did not include their claims. They focus on the district court's informal "Memorandum of Decision," but ignore the other parts of the Record which define the scope of the class action—the class certification Consent Order, the Notice and the Findings of Fact and Conclusions of Law finally entered by the district court and incorporated into the Judgment.

The Consent Order certifying the *EEOC and Cooper* class demonstrates that both classwide as well as individual issues of discrimination were being adjudicated. There, the district court explicitly found that: "there are common questions of law and fact involved"; "the claims and defenses... are typical of the claims and defenses of the class..."; "the plaintiff-intervenors will adequately protect the interest of the class they seek to represent..."; and "questions of law or fact common to the members of the class predominate over any questions affecting only individual members...." [J.A. 28a-29a]. Such findings would have been unnecessary if "individual claims" of discrimination were not in issue.

Similarly, the district court defined the class to include all black employees employed by the Bank "*who have been discriminated against* because of their race in promotions, training, wages, discipline and discharge." [J.A. 53a ¶1 (Emphasis added)]. The Notice mailed to class members informed Petitioners of their right "to pursue in this action *any* claim of racial discrimination in employment that you may have against the defendant." [J.A. 35a-37a (Emphasis added)]. Neither the class certification Consent Order, the Notice to class members, nor the final definition of the class limited the cause of action in the *EEOC and Cooper* action to a "pattern and practice" claim. On the contrary, the district court defined both the class and the class issues in broad, across-the-board terms.

The Findings of Fact and Conclusions of Law also demonstrate that the claims of Petitioners and their class were *actually decided* in the class action. Petitioners continually point out that the district court's "Memorandum of Decision" stated merely that the court did

not find a pattern of discrimination in Grades 6 and above "pervasive enough" to order relief. [Pet. Br. 16; EEOC Br. 15]. But, Petitioners completely ignore the Findings of Fact and Conclusions of Law subsequently entered by the district court which, contrary to their counsel's proposal, clearly decided "*that defendant did not violate Title VII or 42 U.S.C. §1981 with respect to promotions out of Grade 6 and above.*" [P.A. 285a (Emphasis added)].

The significance of that conclusion is highlighted by the fact that Petitioners' counsel sought a quite different conclusion. The Memorandum of Decision directed Petitioners' counsel to prepare proposed Findings of Fact and Conclusions of Law. Petitioners' counsel proposed on this point that the district court *decertify the class* as to employees in Grades 6 and above and proposed the following conclusion:

27. Plaintiffs called several individual witnesses at the trial, some within the class as originally defined and some within the class as modified. *The court expresses no position* at this stage as to the entitlement to relief of the witnesses outside the modified class [the present Petitioners]....⁸

[Proposed Findings of Fact and Conclusions of Law (Emphasis added)]. Contrary to the suggestion that "no position" be expressed as to the entitlement to relief of these very Petitioners (who were "the witnesses outside the modified class"), the district court entered a decision that the Bank had not discriminated against those class

⁸The proposed Findings were included in the Record in the Fourth Circuit, but not in the Joint Appendices there or in this Court. The proposal for certification of a class that included only Grade 4 and 5 employees and the proposed expression of no position on the claims of Petitioners appear at pages 28 and 39 of the Proposed Findings of Fact and Conclusions of Law.

members. The district court's conclusion adopted in lieu of Petitioners' counsel's proposal was that:

27. The Court concludes that there was no showing that the bank had discriminated against black employees with respect to promotions out of Grades 6 and above, and *that defendant did not violate Title VII or 42 U.S.C. §1981 with respect to promotions out of Grade 6 and above.*

[P.A. 285a (Emphasis added)]. This decision by the district court is made even more important by the fact that it is the only significant change to the proposed Findings that the district court made—all other changes were merely grammatical.⁹

As Petitioners suggest, it is important to focus on the "actual language of the judgment" [Pet. Br. 24] to ascertain the scope of the decision. Here, the district court's decision was not limited to "pattern" or "class" issues. Rather, the "actual language of the judgment" stated the affirmative conclusion that the Bank "did not violate Title VII or 42 U.S.C. § 1981 with respect to promotions out of Grade 6 and above." [P.A. 285a].¹⁰ Furthermore, Petitioners did not appeal this conclusion.

⁹ A "marked" copy of the Findings which shows all changes from the proposed to the finally adopted Findings was submitted to the Fourth Circuit following oral argument below, and was included in the Record there. The Court of Appeals was highly critical of the district court's virtual verbatim adoption of Petitioners' counsel's proposed Findings. [See P.A. 13a-24a.] Petitioners sought certiorari on that issue, but it was not granted.

¹⁰ The formal "Judgment" filed contemporaneously with the Findings of Fact and Conclusions of Law makes no specific mention of Grades 6 and above (other than by implication), but the Judgment does specifically state that it is based on those Findings of Fact and Conclusions of Law. The Judgment makes no mention of the Memorandum of Decision.

In summary, the Consent Order certifying the class action included Petitioners' claims in the class action. In the Findings of Fact and Conclusions of Law, the district court *rejected* the proposal to "express no position" on Petitioners' claims and instead concluded affirmatively that the Bank did not discriminate in promotions out of Petitioners' job Grades. So, the "actual language" of the district court expressly demonstrates an adverse decision on the merits of Petitioners' claims. The doctrine of *res judicata* now bars Petitioners from re-litigating those claims.

2. Rule 23 Bars Petitioners' Claims

By participating as class members in the *EEOC and Cooper* class action, Petitioners elected to litigate their claims of discrimination against the Bank through the *Cooper* class representatives. Rule 23 requires that Petitioners be bound by the judgment entered in that action. Indeed, Petitioners' attempt to file individual claims only after the district court indicated it would rule against Petitioners in the class suit is precisely the type of "one-way intervention" which Rule 23 does not permit. Plus, the practical effect of Petitioners' assertion would be to render Rule 23 and the class action meaningless.

a. The Language and Intent of Rule 23

The very language of Fed. R. Civ. P. 23 precludes subsequent actions by class members following their participation in an unsuccessful class action. Rule 23(c)(3) provides that:

The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), *whether or not favorable to the class*, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), *whether or not favorable to the class*, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

Fed. R. Civ. P. 23(c)(3) (Emphasis added). Thus, Rule 23 requires that class members be bound by an adverse judgment.

Rule 23 is designed to avoid a “needless multiplicity of suits” and to permit the adjudication of numerous claims in one proceeding. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974); *Crown, Cork & Seal Co. v. Parker*, 76 L. Ed. 2d 628, 634 (1983). To avoid the impracticalities of joining numerous parties, a class action is litigated through class representatives and their counsel. In *EEOC and Cooper* Petitioners elected not to pursue their claims individually, but instead chose to rely on the class representatives.¹¹ Rule 23 is designed to *adjudicate* the claims of class members in the one action. *General Telephone Co. v. Falcon*, 457 U.S. 147, 155 (1982). It does not permit class members to sit on the fence awaiting judgment in the class action and then to pursue a subsequent “individual” action if the result is not to their liking — as Petitioners seek to do here.

Rule 23 was amended in 1966 to prevent the very procedure which Petitioners seek here. Prior to 1966, Rule 23 provided no means for establishing, prior to the entry of a final judgment, which persons were class members and would be bound by the judgment. *American Pipe & Construction Co. v. Utah*, 414 U.S. at 545-46. Under the present version of Rule 23, however, a class member may not await the outcome of the trial in the class action, and then decide whether to pursue the same course of action in another proceeding. In *American Pipe*, 414 U.S. at 547-49, this Court noted that the 1966 amendments to Rule 23 were specifically intended to cure the former procedures permitting class members to await developments in the trial “or even final judgment” before deciding whether to opt out as class members. This Court stated that, as presently written, Rule 23 requires that:

potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation ‘as soon as practicable after the commencement’ of the action.... Thereafter they are either non-

¹¹ Petitioners have not asserted that their representation in the class action was inadequate.

parties to the suit and ineligible to participate in a recovery or to be bound by the judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.

414 U.S. at 548-49.

After electing to litigate their claims in the class action, Petitioners now seek to avoid the judgment in that action and gain a second chance to re-litigate those claims. That is precisely what Rule 23 was amended to prevent.

b. *Petitioners' Election*

Petitioners correctly state several principles: The fact that an employer's workforce is racially balanced does not immunize an employer from liability for specific acts of discrimination, *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); an employer's "bottom line" in promotions is not an affirmative defense to a claim of particular acts of discrimination, *Connecticut v. Teal*, 457 U.S. 440 (1982); conversely, the existence of an individual act of discrimination does not require an inference that such treatment is typical of an employer's practices, *General Telephone Co. v. Falcon*, 457 U.S. at 157-58; and the fact that there is no showing of a "pattern and practice" of discrimination does not require the conclusion that there may not have been isolated or sporadic individual acts of discrimination, *Teamsters v. United States*, 431 U.S. at 336. [Pet. Br. 43-45]. All of those principles are true, but they are principles of proof, not of substantive procedure. While individual acts of discrimination may exist even in the absence of a "pattern and practice" of discrimination, that does not determine the *vehicle* for litigating ones' claims. *Here*, these Petitioners elected not to pursue their claims individually, but to join in the class action. They were not denied their *right* to pursue their claims individually. In fact the Notice advised them of that right. But, *they* elected not to pursue their claims in that manner, but to pursue them as class members in the class action.

Petitioners accuse the Bank of "thwarting" their efforts to pursue their individual claims. [Pet. Br. 12]. In fact, it was Petitioners themselves who "thwarted" their right to an individual suit by elec-

ting not to exercise that right. The class action Complaint was filed by four intervenors in 1977. Upon Petitioners' consent, the *EEOC and Cooper* action was conditionally certified as a class action in April 1978 pursuant to both Rule 23 (b) (2) and (b) (3). [J.A. 30a]. When the district court conditionally certified the class, it required that a Notice be sent to each class member. Each of these Petitioners actually received the Notice. [J.A. 95a]. The Notice informed Petitioners that they would "be bound by the determination in this action" unless they excluded themselves from the class, and that if they opted out of the class they would not be bound by the decision in the class action.¹² Petitioners did not opt out of the class action; nor did they seek to intervene in it as named parties (prior to the

¹² The Notice stated in pertinent part:

3. The class of persons who are entitled to participate in this action as members of the class represented by the plaintiff-intervenors, for whom relief may be sought in this action by the plaintiff-intervenors and who will be bound by the determination in this action is defined to include: all black persons who were employed by the Federal Reserve Bank of Richmond at its Charlotte Branch Office at any time since January 4, 1974.

4. ... if you so desire, you may exclude yourself from the class by notifying the Clerk, United States District Court, as provided in paragraph 6 below.

5. If you decide to remain in this action, you should be advised that: the court will include you in the class in this action unless you request to be excluded from the class in writing; the judgment in this case, whether favorable or unfavorable to the plaintiff and the plaintiff-intervenors, will include all members of the class; all class members will be bound by the judgment or other determination of this action

6. If you desire to exclude yourself from this action, you will not be bound by any judgment or other determination in this action and you will not be able to depend on this action to toll any statutes of limitations on any individual claims that you may have against the defendant

[J.A. 35a-37a (Emphasis added)]. Petitioners raise a question about the adequacy of this Notice. However, the Notice tracks the language of Rule 23 itself. Moreover, Petitioners' counsel consented to the Notice in the Consent Order. [J.A. 24a].

adverse ruling as to their class). Instead, they elected to pursue their claims as class members and actually testified in support of the class action.

Binding Petitioners to the adverse judgment in the class action is particularly appropriate in this case because:

- Petitioners had never filed charges of discrimination with the EEOC;
- they were given notice of the opportunity to pursue their claims as individuals when the class was certified *two years* prior to trial;
- they never moved to intervene in the class action even though their counsel had intervened on behalf of four other individuals and the Bank had not opposed that intervention;
- their counsel consented to a bifurcated trial of the class action;
- they first “appeared” in the class action on a witness list filed four days prior to the trial, but did not attempt to intervene even then;
- they appeared and testified at the trial of the class action, but made no attempt to intervene — even after the district court stated that it would not make a determination of their personal claims; and
- they made no attempt to assert their personal claims until *four months* after they learned that their class had lost the class action.

As class members in the previous class action, these Petitioners received notice of the proceedings and were given the option of pursuing their claims via the class action or opting out of that action and pursuing them individually. The Notice spelled out the fact that they would be bound by the judgment in that action “whether favorable or unfavorable” unless they opted out of the class action. With that knowledge, Petitioners elected to pursue their claims as class members in the class action. The class action judgment was adverse to their class. Accordingly, Rule 23 requires that Petitioners be bound by their election.

c. *The Practical Effect of Petitioners' Assertion*

The practical effect of Petitioners' submission would destroy the class action as a vehicle for litigating multiple claims and would effectively erase Rule 23 from the Federal Rules of Civil Procedure.

Petitioners' submission is simple: after an adverse decision in a class action—that the Bank did not discriminate in promotions in Grade 6 and above—Petitioners can nevertheless pursue their “individual claims” that they had been discriminated against in promotions in Grade 6 and above. If these Petitioners can pursue such an action, so can each and every one of the 300 or so other class members.¹³ And, after prevailing on the merits of the class action, the Bank may face “individual” suits by each and every class member.

If Petitioners' assertion is the rule, then the practical result is that no purpose is served by Rule 23 and the class action. Although Petitioners assert that they do not seek “one-way intervention,” that is precisely the result of their submission. Petitioners' rule would permit them to participate as non-named class members in the class action (as they did) and: (i) if they won the class action, obtain a *presumption* of discrimination¹⁴ in their favor; and (b) if they *lost* the class action, *still maintain* their “individual claims” for relief. What Petitioners suggest is a “no lose” situation that any litigant would envy. It makes the class action a no-risk situation for plaintiffs

¹³The tolling effect of the class action, *American Pipe*, 414 U.S. 538 (1974), if added to the three-year limitations period for § 1981 actions, N.C. Gen. Stat. § 1-52, may render the potential claims of each class member still vital, even though the claims are possibly 10 years old. Of course, if, as Petitioners assert, the “individual claims” were not part of the class action, then the class action should not toll the running of statutes of limitations and those claims may be barred on that account.

¹⁴In the trial of a bifurcated class action, Stage I of the trial determines liability. If a pattern and practice of discrimination is demonstrated in Stage I, each class member receives a rebuttable presumption that he is a victim of that discrimination and is presumed to be entitled to relief in Stage II of the proceeding. See *Teamsters v. United States*, 431 U.S. 324, 359-362 (1977).

and a no-win situation for the defendant—since even if the defendant prevails on the merits in the class action, the class can roll on “individually.”

Petitioners suggest that the Fourth Circuit’s decision will force all class members to intervene in the class action.¹⁵ Multiple intervention is a false fear because there are many good reasons for class members to elect to litigate their “individual claims” as class members—as Petitioners did. First, a class member’s chances of winning relief are probably greater in a class action than in an individual suit. The pattern and practice class action has proved to be an effective and successful device for plaintiffs in employment discrimination cases. Methods of proof—such as the “pattern and practice” proof scheme and statistical proof—may be available in a class action that would not be probative in an individual action. The cumulative effect of multiple claims may have greater impact than an individual claim. And, once successful in Stage I of the class action, each class member receives a valuable *presumption* of entitlement to relief that may convert a losing claim into a winning one. Second, there are real economic advantages to litigating one’s “individual claim” as a class member. This Court has noted that “a central concept of Rule 23” is that a class member has access to the pooled resources of the entire class, and the costs of litigation are shared among the entire class. *Deposit Guaranty National Bank v. Roper*, 445 U.S. at 338 n.9. In this very case, for example, Petitioners—as class members—were represented by three lawyers and as many paralegals and had the benefit of an expert statistician who performed analyses and testified at the trial (for \$50,000.00).¹⁶ An individual employee certainly could not muster that kind of support for his “individual claims” in an individual action. Thus, there are real, practical benefits for class members who elect to litigate their claims as a class member in a class action.

¹⁵ Of course, if class members are permitted to pursue “individual claims” after an unsuccessful class action as Petitioners suggest, then it would behoove the *defendant* to move the court to join all the class members as named parties in order to obtain a binding judgment against them.

¹⁶ See, Motion for Attorneys Fees and supporting Affidavits filed in the Record of the district court in *EEOC and Cooper*.

Petitioners' proposition is also inherently inconsistent. It would permit each and every one of the 300 passive members of the *EEOC and Cooper* class to file individual suits against the Bank despite the district court's conclusion that the Bank did not discriminate as to promotions in Grade 6 and above. This is simply "massive intervention" of a different type. Surely the prospect of 300 individual suits against the Bank, filed at various times and perhaps in various forums, is much worse than requiring that all class members' claims be managed and adjudicated by the district court in one proceeding.

Petitioners' suggestion that, under their rule, a defendant would benefit by class members not being able to assert a "pattern and practice" of discrimination as evidence in subsequent "individual" actions is similarly unsound. The purpose of Rule 23 and the class action device is not to establish a rule of *evidence*. The Bank certainly cannot be expected to defend this action for over six years—at great expense—just to eliminate one piece of evidence from multiple subsequent individual actions. In fact, this assertion demonstrates the illogic of Petitioners' position. Their position—by their own submission—would reduce a class action into nothing more than an evidentiary ruling. Such a result is certainly not contemplated by Rule 23 and is wholly illogical.

The purpose of Rule 23 and the class action is to avoid needless multiplicity of suits and to adjudicate numerous claims in one suit. If this purpose is to be effected, the judgment in the class action must be binding on class members.

d. Other Decisions of this Court Involving Rule 23

The decision of the Fourth Circuit barring Petitioners' subsequent action is consistent with other decisions of this Court involving class actions. It fits well within the framework of this Court's other decisions involving Rule 23. In fact, the result here has been suggested in other decisions of this Court.

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Court held that the pendency of the class action tolled the running of statutes of limitations on class members' right to intervene in the action as individuals after denial of class certification.

414 U.S. at 553. That principle was recently applied to class members' rights to file separate actions. *Crown, Cork & Seal Co. v. Parker*, 76 L. Ed. 2d 628 (1983). However, both of those cases dealt only with the tolling of limitations periods pending *class certification*. In both of those cases class certification was *denied*. Putative class members were freed to file individual actions because there was no judgment in the class action. In contrast, in this case the class was certified and there was a judgment on the merits in the class action. So, the fact that the limitations periods for individual actions by class members may have been tolled during the pendency of the putative class action is consistent with ~~extinguishing~~ the right to an individual action by the adverse class action judgment on the merits. In fact, *American Pipe* actually noted that Rule 23 had been amended to prevent the "one-way intervention" Petitioners seek to accomplish here. 414 U.S. at 547-49.

In *General Telephone Company v. EEOC*, 446 U.S. 318 (1980), this Court held that the EEOC could seek relief for a group of aggrieved individuals without certification as a class representative pursuant to Rule 23. The Court noted that one effect of the ruling was that the individuals would *not* be bound by the relief obtained by an EEOC judgment or settlement. 446 U.S. at 333. But, in the course of discussing that result, the Court suggested that the result would be different in a private class action certified pursuant to Rule 23. This Court noted that: "We are sensitive to the importance of the res judicata aspects of Rule 23 judgments. . . ." 446 U.S. at 332.

The Fourth Circuit's decision that Petitioners are bound by the adverse judgment in the prior, private class action is consistent with the language and intent of Rule 23 and with the decisions of this Court. Further, it follows the result suggested in *General Telephone*.

II. The Bank Did Not Acquiesce In Subsequent Individual Actions And The District Court Did Not Authorize Subsequent Actions

Petitioners' assertion that the Bank acquiesced in or acknowledged Petitioners' right to pursue individual claims in subsequent suits is misleading. In the course of opposing intervention in the class action after the trial, the Bank's counsel, relying on certain

portions of *dicta* in *Dickerson v. United States Steel Corp.*, 582 F.2d 827 (3d Cir. 1978), did state Petitioners might file a subsequent action.¹⁷ But, the Record is clear that the Bank's position throughout was that Petitioners' individual claims were barred by *res judicata*.

For example, at the hearing on Petitioners' Motion to Intervene, the Bank's counsel stated its position in the following manner:

MR. HODGES: The problem, Your Honor, is that these people chose to participate in this case as class members, and in a class action the judgment of the Court is that their part of the class should receive no relief, so they are not entitled to proceed any further. They have a judgment entered against them on the part of the class. [p. 4].

* * * * *

MR. HODGES: That's right, and they could go file charges with the EEOC, file a case under 1981, but they could not participate any longer in this case. They are not entitled simply to go into Stage 2 to pursue their claims. They've got to do what any other Plaintiff with a complaint has got to do and that is to go through the proper procedure. They are people that actually showed up in this case about a week before trial and just happened to come in and testify, and I don't believe that gives them any additional status than any of the other class members in Grades 6 and above would have. *They are bound by the judgment against them.* [p. 8].

* * * * *

COURT: You're unnecessarily complicating the possibility of getting an ultimate decision on the merits by skipping what would ordinarily be normal procedure.

¹⁷ Petitioners' selective quotation of statements made at the hearing on their Motion to Intervene appears to imply that counsel misled the district court about the Bank's position. Actually, if the district court was led into an erroneous conclusion about Petitioners' right to file a subsequent action, it was by the statements in *dicta* in *Dickerson* and not any statements by counsel.

MR. HODGES: Your Honor, that doesn't avoid the problem that you've got that they should have a judgment entered against them as they are part of a class. [p. 10].

* * * * *

MR. HODGES: The Third Circuit decided otherwise. They said the intervention of class members would prejudice the Defendant severely. From the outset this lawsuit was tried as a class action, based primarily upon the allegations of across the board discrimination. That's exactly the case here. There's no reason to give these Plaintiffs a second bite out of the apple in this case. Stage 2 proceedings are for the successful class members, not the unsuccessful. Otherwise why have a Stage 1 proceeding. [p. 17].

* * * * *

MR. CHAMBERS: As to the class. *If the Court follows that reasoning, it would say that the individuals now are barred by res judicata.*

MR. HODGES: *That's exactly what they [sic] ought to do.* [p. 19-20].

[Citations are to the transcript of the hearing on Petitioners' Motion to Intervene, May 8, 1981, which has been filed in this Court with the Joint Appendix (Emphasis added)]. The Bank clearly did not acquiesce in or agree to Petitioners' subsequent action. Rather, the Bank's position was that it was entitled to a judgment against Petitioners and any subsequent actions would be barred by *res judicata*. Consequently, when the subsequent action was filed, the Bank moved that it be dismissed on that basis.

Petitioners' assertion that the district court authorized the subsequent action misapplies principles relating to splitting claims and misconstrues what the district court actually did. Restatement (Second) of Judgments § 20 (1)(b), by its terms, applies only where the plaintiff is "nonsuited" or his claims "dismissed" without prejudice. Here, there was a judgment *on the merits*. Plus, all that was "dismissed" was their Motion to Intervene — not a prior action as

contemplated by the Restatement. The assertion that the district court "expressly reserved" Petitioners' right to maintain a second action misapplies Restatement (Second) of Judgments § 26. That applies only where causes of action are "split" and the claims "reserved" are omitted from the first action. It does not permit "reservation" of claims included in the first action such as is the case here — especially *after* a decision on the merits has been announced. See Restatement (Second) of Judgments § 26 comment b. Moreover, the district court here did not "expressly reserve" any rights. In the Order denying intervention the district court merely expressed an opinion that the Petitioners *might* be able to pursue a separate action:

I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week . . . All motions for leave to intervene are thus denied without prejudice to any underlying rights the intervenors may have.

[P.A. 288a-289a (Emphasis added)]. The Restatement exception applies to *express* reservations of rights, not to advisory comments about possible rights as the statement above. Consequently, there was no reservation of rights by the district court nor acquiescence by the Bank as to Petitioners' subsequent action.

II. The Claims of Petitioner Harrison

Both courts below stated Petitioner Harrison to be a Grade 3 employee. But, in fact, Harrison was at all times a Grade 6 employee. The Bank has furnished counsel for Petitioners portions of Harrison's employment records, all of which confirm that he was a Grade 6 employee.¹⁸ Accordingly, counsel for Petitioners has advised the Bank that they have withdrawn their assertions based upon the erroneous statements of the courts below that Harrison was a Grade 3 employee. [Pet. Br. 53-56]. Thus, the parties now agree that Harrison's position is the same as the other Petitioners, and the Bank makes no substantive response to the assertions regarding Harrison.

¹⁸ Harrison's job Grade was not a significant issue at this trial, so there is little in the actual Record regarding his Grade. Harrison testified first that he was a Grade 3 but when asked if he was not actually a Grade 6, he said he did not know. [1 C.A. App. 537, 540]. The Record also contains a group of job descriptions [DX 70] which shows that Harrison's job of "stock clerk" (he called it "supply clerk" [1 C.A. App. 537]) was a Grade 6 job. [DX 70 page 5-291].

CONCLUSION

For the reasons stated above, the Bank submits that the rule this Court should adopt is that: a properly certified class action is made up of the "individual claims" of class members, and those class members who, after notice, elect to litigate their claims in the class action are thereafter precluded from re-litigating individual claims within the range of issues determined in the class action. Consequently, the decision of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted this 26th day of January, 1984.

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No. 83-185

Office - Supreme Court, U.S.

FILED

MAR 8 1984

ALEXANDER L. STEVAS.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

PHYLLIS BAXTER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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No. 83-185

SUPREME COURT OF THE UNITED STATES

October Term, 1983

SYLVIA COOPER, et al.,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

PHYLLIS BAXTER, et al.,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

PETITIONERS' REPLY BRIEF

This case presents two distinct
issues, one essentially factual, the other

legal. First, did the district court in the Cooper action in fact decide whether or not petitioners Baxter, Gilliam, Knott, Harrison and McCorkle had been rejected for promotions because of racial discrimination? Second, if the district court in Cooper did not thus decide the individual claims of the Baxter plaintiffs, can the decision in Cooper nonetheless bar litigation of those unresolved claims in a later case?

We explained in our initial brief that the Baxter plaintiffs attempted on three different occasions to obtain a resolution of their claims in Cooper, and that in each instance the bank adamantly and successfully argued against consideration of those claims by the district court. (Pet. Br. 35-38.) We noted as well that in its

opinions of October 30, 1980,^{1/} May 8, 1981,^{2/} and May 29, 1981,^{3/} the district court expressly stated that its finding regarding Grades 6 and above was only that there had been insufficient evidence of "classwide" discrimination. The bank, however, argues that the district court resolved the merits of the Baxter plaintiffs' claims in its Findings of Fact and Conclusions of Law, and that the district court there held that each of the Baxter plaintiffs had been denied the disputed promotion for legitimate non-racial reasons. (Resp. Br. 13-16.) The bank, of course, can point to no finding of non-discrimination which actually mentions Baxter, Gilliam, Knott, Harrison or McCorkle by

1/ P.A. 194a.

2/ Pet. Br. 42, text at note 20.

3/ P.A. 287a.

name. Rather, the bank relies solely on the following passage from the Conclusions of Law:

27. The Court concludes that there was no showing that the bank had discriminated against black employees with respect to promotions out of Grades 6 and above, and that defendant did not violate Title VII or 42 U.S.C. § 1981 with respect to promotions out of Grades 6 and above. (P.A. 285a)

The bank urges that paragraph 27 held, not only that there had been no classwide discrimination in Grades 6 and above, but also that not a single black employee in Grades 6 and above had ever been the victim of any isolated act of discrimination.

This construction of paragraph 27 is clearly mistaken. First, paragraphs 7 and 11 of the same Conclusions of Law, (P.A. 267a, 272a), expressly held that plaintiffs Cooper and Russell, both of whom were in Grade 6 or above, had been denied promo-

tions because of racial discrimination. Thus, paragraph 27 cannot mean there had never been any discrimination in those grades. Second, in a separate order denying Baxter's motion to intervene, an order issued on the same day as the Findings of Fact and Conclusions of Law, the district judge described those Findings of Fact and Conclusions of Law as having held only that there was "no proof of any class-wide discrimination above grade 5." (P.A. 287a.) (Emphasis added). Third, since the district judge had announced during the Cooper trial that he would not decide the claims of the Baxter plaintiffs (Pet. Br. 36), the general language of paragraph 27 cannot plausibly be read as containing any such decision. Fourth, where the Conclusions of Law do reject the claims of individuals, this is done expressly and in detail; the allegations of plaintiffs

Moore and Hannah are thoroughly discussed and unambiguously rejected in paragraphs 13-16. (P.A. 274a-777a.) Had the district court intended to reject as well the claims of Baxter, Gilliam, Knott, Harrison and McCorkle, it certainly would have done so with equal specificity.

If this Court has any doubts regarding the meaning of paragraph 27, it should remand that issue for resolution by the district court. The district judge who personally drafted paragraph 27 is clearly in the best position to resolve any perceived ambiguity in its language. There is no need or justification for the appellate courts to speculate about the scope of that finding so long as the trial judge is available to resolve the matter in the most authoritative possible manner.

The second issue presented by this case is whether, in the absence of a

determination of the specific claims of individual class members, a mere finding that there was no pattern of classwide discrimination bars, as a matter of res judicata, the litigation of those individual claims. But while the nature of this issue is clear, the position of the bank is not. Rather than squarely asserting that res judicata could bar litigation of individual claims that were not in fact adjudicated in a prior class action, the bank repeatedly characterizes the earlier class action opinion in vague language which artfully obscures the nature of the issue. The bank asserts, for example:

Petitioners are bound by the adverse judgment in the prior class action. (Resp. Br. 4) (Emphasis added).

The ingeniously ambiguous word "adverse," a term used more than a dozen times in

Respondent's brief,^{4/} invites the Court to confuse and equate a prior decision that there was no pattern of classwide discrimination in Grades 6 and above with a prior decision that the individual Baxter plaintiffs had not been the victims of discrimination. Either type of prior decision could be characterized as "adverse" to the Baxter plaintiffs, but the res judicata consequences of the two are obviously very different. Elsewhere the bank urges the Court to hold that res judicata applies to "the range of issues determined in the class action,"^{5/} without explaining whether the phrase "range of issues" in this proposed rule encompasses

^{4/} Resp. Br., pp. ii, 1, 4, 6, 17, 20, 21.

^{5/} Resp. Br. 5, 29.

issues not in fact so decided in the class action.^{6/}

At one point in its brief the bank concedes that the doctrine of res judicata has traditionally been applied only where there has been a "final judgment on the merits of an action" (Resp. Br. 6.) If that is the bank's position, then a decision by this Court that the district court did not resolve the merits of the Baxter claims would be dispositive of this case. Other passages in the bank's brief, however, seem to suggest a far different rule, that once a class is certified, the class members who do not opt out are forever barred from bringing individual lawsuits, regardless of whether, or why,

6/ Similar confusion is invited by other passages in Respondent's Brief. At page 7, for example, the bank coyly states that the issue of discrimination in promotions was "resolved against the Petitioners" in Cooper.

their claims are not in fact resolved in the class action. On that view, res judicata would apply to a case such as this in which the district court, having found no classwide discrimination, believed it was precluded from adjudicating the individual claims because of this Court's decision delineating the bifurcated trial process in International Brotherhood of Teamsters v. United States, 431 U.S. 360, 360-62 (1977). The Boeing Company, an amicus in this case and the petitioner in No. 83-185,^{7/} apparently supporting this approach, argues that res judicata should apply to a case such as Edwards v. Boeing-Vertol Co., 717 F.2d 761 (3d Cir. 1983), in which an individual's claim was not adjudicated in an earlier class

^{7/} Boeing Vertol Co. v. Edwards.

action because the courts in that class action had lacked jurisdiction over his claim. See 717 F.2d at 767. Similar reasoning would extend res judicata effect to decisions in class actions refusing to adjudicate the class or individual claims because of improper venue, forum non conveniens, failure to exhaust administrative remedies, or subsequent redefinition of the class.

None of the authorities relied on by the bank would support any such radical alteration of the law of res judicata. The bank cites five decisions which it asserts hold that "'individual claims' are encompassed in the class action and thus represent the 'same cause of action' and may not be re-litigated." (Resp. Br. 7.)^{8/}

^{8/} Kemp v. Birmingham News Co., 608 F.2d 1049 (5th Cir. 1979); Fowler v. Birmingham

But every one of these cases involved an individual lawsuit seeking to relitigate issues that had in fact been settled by a prior class action consent decree; none of them suggests that res judicata could apply to claims that were not actually resolved by a consent decree or in some other fashion. The bank describes Croker v. Boeing Co., 662 F.2d 975, 997 (3d Cir. 1981), as dismissing

as barred by res judicata two individual claims 'because they were not named plaintiffs but Oather were class-member witnesses whose classwide claims had been unsuccessful' in the earlier class action. ... (Resp. Br. 10)

8/ (continued)

News Co., 608 F.2d 1055 (5th Cir. 1979), Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1259 (9th Cir. 1981); Woodson v. Fulton, 614 F.2d 940 (4th Cir. 1980); Dalton v. Employment Security Comm'n, 671 F.2d 835 (4th Cir.), cert. denied, 74 L.Ed.2d 117 (1982).

This characterization of Croker is entirely inaccurate. No reference to any res judicata issue is to be found at the cited page. The two individual claimants in Croker were not permitted to litigate their claims in that case solely because they had not yet met the jurisdictional prerequisite of a Title VII action by filing a charge with the EEOC. See 662 F.2d at 997.

Both of the courts below asserted that petitioner Harrison was a Grade 3 employee. In our principal brief we discussed the manner in which the legal position of a Grade 3 employee differed from that of a Grade 6. (Pet. Br. 53-56, 64-65.) Since then, however, the bank has called to our attention documents outside the record which demonstrate that Harrison was in fact a Grade 6. Accordingly, we agree with the bank that Harrison's position is the same as that of the other petitioners.

CONCLUSION

For the above reasons, the decision of
the court of appeals should be reversed.

Respectfully submitted,

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No. 83-185

IN THE
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October Term, 1983

SYLVIA COOPER, et al.,

Petitioners

v.

FEDERAL RESERVE BANK OF RICHMOND,

Respondent

**BRIEF FOR THE BOEING COMPANY
AS AMICUS CURIAE SUPPORTING
RESPONDENT**

On Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit.

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QUESTION PRESENTED

Whether a final judgment against the plaintiff class in a properly certified class action precludes a class member who had notice of the class action and actively participated in it from litigating an individual claim within the range of claims decided in the class suit.

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No. 83-185

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**BRIEF FOR THE BOEING COMPANY
AS AMICUS CURIAE SUPPORTING
RESPONDENT**

On Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit

The Boeing Company submits this Brief as *amicus curiae* with the consent of the parties¹ and urges this Court to affirm the judgment and the holding of the United States Court of Appeals for the Fourth Circuit. That judgment and holding, which faithfully reflect the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure and settled principles of *res judicata*, are

1. Copies of the letters of consent are attached.

under attack by persons who seek to avoid the preclusive effects of final judgments in class actions. Boeing also submits that the present case should be considered in tandem with No. 83-902, *Boeing Vertol Co. v. Edwards*, or with careful attention to the closely related issues presented in that case. The plaintiff in *Boeing Vertol* is seeking to escape the *res judicata* effect of a judgment against his class, and in addition to avoid the collateral estoppel effect of findings of fact and conclusions of law referring to him that were entered in order to decide the class claims.

INTEREST OF AMICUS

In General

The Boeing Company, a worldwide aerospace and diversified manufacturing and services company, employs more than 80,000 people in the United States alone. Boeing has been and is currently a defendant in class action litigation, and like other prevailing class action defendants, Boeing has been and expects again to be confronted with suits brought by members of unsuccessful plaintiff classes who seek to evade the class action findings, conclusions, and judgments.

The Directly Pertinent Boeing Vertol Case

A major operating division of The Boeing Company is a defendant in No. 83-902, *Boeing Vertol Company v. Edwards* (petition for certiorari filed November 29, 1983). In *Boeing Vertol*, as in the present case, a member of the plaintiff class in an unsuccessful employment discrimination class action has brought an individual claim encompassed by the earlier judgment against the class. The plaintiff in *Boeing Vertol* is also attempting to collaterally attack specific findings of fact and conclusions of law that were necessarily entered in order to decide the class claims.

In the prior class action case at issue in *Boeing Vertol*, the United States District Court for the Eastern District of Pennsylvania entered a final judgment and held that The Boeing Company had not unlawfully discriminated against a class consisting of certain Black employees in promotions and other employment decisions in the period from 1965 to 1975. *Croker v. The Boeing Company (Vertol Division)*, 437 F. Supp. 1138 (E.D. Pa. 1977), *aff'd*, 662 F.2d 975 (CA3 1981) (*en banc*).

The plaintiff class in *Croker v. Boeing* presented both statistical and anecdotal evidence of alleged discrimination. The anecdotal evidence consisted of testimony of class members concerning "illustrative individual acts of alleged discrimination." The testimony of class member John F. Edwards was offered for the avowed purpose of establishing that as an illustrative individual victim of the supposed discrimination against the class, he had been denied a promotion to Supervisor in "production and maintenance" because of his race.

In the *Croker v. Boeing* case, as in the class action case underlying the case at bar, the class action court weighed the testimony concerning "illustrative acts" in deciding the class claims, and determined that there had been no pattern or practice of discrimination of certain specific types — one of which in *Croker v. Boeing* was promotions to Supervisor in "production and maintenance" positions from 1965 to 1975. The court in *Croker v. Boeing* also made specific findings of fact and conclusions of law with respect to the anecdotal evidence, including findings and conclusions discrediting Edwards' testimony and holding that "any inference of discrimination" had been rebutted as to him. 437 F. Supp. at 1176, 1197. The Third Circuit affirmed the findings, the conclusions, and the judgment against the class. 662 F.2d 975, 993-95.

Three and a half years after the entry of the judgment against the class, Edwards brought an individual

suit in the same district court. Echoing his testimony in the class action case, Edwards alleged that he had been discriminatorily denied a promotion to Supervisor in the period from 1965 to 1975. Beginning with its first filing and continuously thereafter, Boeing defended on the grounds of *res judicata* and collateral estoppel as well as on other grounds.²

Reserving judgment on *res judicata* and collateral estoppel, the District Court permitted the case to proceed to trial. Boeing once again prevailed on the merits of all of Edwards' claims. The District Court therefore had no occasion to reach the issues of *res judicata* or collateral estoppel.

The Third Circuit reversed in the decision that is presently before this Court in No. 83-902. The Third Circuit first held that the District Court had committed errors that would require a new trial unless trial was precluded by the *Croker v. Boeing* decision.³ The Third Circuit then held that neither *res judicata* nor collateral estoppel was available to Boeing. The Third Circuit reasoned that as a class member who was neither a named plaintiff nor an intervenor, Edwards had not individually had an opportunity for appellate review. *Edwards v. Boeing Vertol Co.*, 717 F.2d 761, 767 (CA3 1983). The Third Circuit's decision conflicts with the Fourth Circuit decision in the case at bar.⁴

2. Unlike the plaintiffs in the case at bar (see part II(2) of the Brief for Petitioners), Edwards has never asserted that Boeing waived any defenses.

3. The Third Circuit held, *inter alia*, that the District Court should have allowed tolling of the statute of limitations for the full duration of the class action case, even though Edwards had waited more than eight years after class certification before purporting to renounce the class case and pursue an individual suit. The correctness of that holding, which is squarely contrary to decisions of other Courts of Appeals, is a distinct issue presented for review in the Petition for Certiorari in No. 83-902.

4. The decision of the Fourth Circuit in the present case was called to the Third Circuit's attention in the briefs and at oral argument, but the Third Circuit opinion does not mention the Fourth Circuit case.

The Boeing Company believes that awareness of the distinct but closely related issues presented by *Boeing Vertol v. Edwards* — the propriety of class members' attacking unfavorable class action judgments and the findings of fact and conclusions of law that have been entered in order to issue those judgments — may provide this Court with a perspective useful in reaching a decision that preserves the purposes of the doctrine of *res judicata*, is faithful to the policies of the amended class action rules, and advances considerations of judicial efficiency.

SUMMARY OF ARGUMENT

Members of a properly certified plaintiff class should be precluded from filing individual suits which present claims that have been decided against the class or that could have been presented in the class case. Exceptions are warranted only for class members who have been demonstrably prejudiced by improper application of Rule 23. In other words, in the absence of improper class certification, inadequate notice, or inadequacy of representation, a prior judgment against a class should be an absolute bar to claims within the range of the class claims. That conclusion is compelled by the class action rules and by settled principles of *res judicata*.

ARGUMENT

The Fourth Circuit Correctly Held That Absent Inadequate Notice Or Inadequate Representation, A Judgment Against A Plaintiff Class In A Class Action Case Precludes Members Of The Class From Litigating Individual Claims In Categories Ruled Upon In The Class Case

The Fourth Circuit has held in the present case that a class member "seeking relief individually on charges of discrimination within the charges determined in the class action is precluded by *res judicata* from maintaining subsequently an individual action claiming discrimination in a particular ruled on in the class action." *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 674 (CA4 1983). The Fourth Circuit has recognized exceptions for cases in which the class certification is found to have been improper, where notice has been inadequate, or where there has been inadequate representation of the class members who are not named parties.⁵ The Fourth Circuit correctly interpreted and applied settled class action rules and principles of *res judicata*.

This Court has long recognized, as "familiar doctrine," that members of a plaintiff class "not present as parties to the litigation may be bound by the judgment when they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties." *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). In consequence, since they are bound by the judgment, the class and its members are precluded from asserting claims that were or could have been asserted in the class action. See, e.g., *Restatement (Second) of Judgments* §19 (1982).

5. There was no such deficiency here. Indeed, the record shows that the plaintiffs in this case were especially active participants who even testified about their own supposed circumstances in the unsuccessful class action case.

In the present case, neither petitioners nor the Equal Employment Opportunity Commission appear to contend that class actions are a species unto themselves for purposes of *res judicata* and collateral estoppel. Nor could they; the fundamental premise of a class action is that class members who are not formal parties, but who are adequately represented or who actually participate, are legally present through the class representatives and, as a consequence, are in the same legal position as named parties. *Hansberry v. Lee*, *supra*; e.g., *Adams v. Proctor & Gamble Co.*, 697 F.2d 582, 583-84 (CA4 1983); *Goff v. Menke*, 672 F.2d 702, 704 (CA8 1982); *Laskey v. United Automobile Workers*, 638 F.2d 954, 956-57 (CA6 1981); *Byrd v. Prudential Ins. Co.*, 30 FEP Cases 304, 305-06, 30 CCH EPD ¶133,195 at pp. 27,724 to 27,726 (S.D. Tex. 1982).

The EEOC and petitioners do, however, appear to be arguing for a waiver of this principle in employment discrimination class actions. Because isolated acts of discrimination can exist without a class-wide pattern or practice of discrimination, they contend that the individual claims, which were combined at their behest in order to create a class action, can thereafter be disaggregated to avoid the preclusive consequences of an adverse judgment against the class. *See, e.g.*, EEOC amicus brief at 12-13. This reasoning, however, totally disregards the concept of representative litigation and the doctrine of *res judicata*. The class action is not a substantive or independent cause of action; it is a procedure by which individual claims are joined and through which relief may be obtained or not for each class member in accordance with the court's judgment. There is no alternative remedy for such properly conjoined claims outside of or in addition to the class action. To the contrary, such individual claims are merged in and barred by the judgment in the class case. Were it otherwise, as petitioners and the EEOC contend here, then Rule 23 and the doctrines of *res judicata* and claim preclusion promote years of

complex and costly litigation on a false promise of ultimate economy to the courts and litigants alike.

The flood of stale and repetitive individual claims that petitioners would permit runs exactly contrary to the result intended by the fundamental restructuring of Rule 23 of the Federal Rules of Civil Procedure which this Court adopted in 1966, 383 U.S. 1031. Prior to 1966, Rule 23(a)(3) permitted a so-called "spurious" class action in cases involving common questions of law or fact and seeking common relief. The judgment in a "spurious" class action bound only named parties and intervenors and excluded other class members.⁶ It has been said of the aptly named "spurious" class action that "[w]hen a suit was brought by . . . such a class, it was merely an invitation to joinder — an invitation to become a fellow traveler in the litigation, which might or might not be accepted." 3B J. Moore, *Federal Practice & Procedure* §23.10[1] at page 26-2603 (1982).

In practice under the pre-1966 class action rules, however, the lower federal courts often permitted class members to intervene after a decision on the merits favorable to their interests. The consequence, as this Court noted, was that "members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests." *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547 (1974). Not only was an unsuccessful defendant typically deluged with intervenors seeking an effortless path to relief; he was also precluded from redefining and reasserting his defenses against these intervenors. But the converse was not true. A defendant who had actually litigated issues common to the class against the class representatives, who had sustained the additional and often staggering costs of defending class

6. Advisory Committee Notes to 1966 Amendments to Rule 23(c)(3), Fed. R. Civ. P.

litigation, and who had ultimately prevailed, was not awarded *res judicata* commensurate with the degree of preclusion he had risked. He was protected only from suits brought by named parties and those who had chosen (unnecessarily) to intervene before judgment.

The "spurious" class action and the "one-way intervention" tolerated by certain courts were much criticized on the ground that "it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." Accordingly, the 1966 amendments were designed "specifically to mend this perceived defect in the former Rule [*i.e.*, to preclude any possibility of one-way intervention] and to assure that members of the class would be identified *before* trial on the merits and *would be bound by all subsequent orders and judgments.*" *American Pipe*, 414 U.S. at 547 (emphasis supplied).

The cornerstone of the 1966 amendments is Rule 23(c)(3), which determines exactly who is bound by the judgment in a class action.⁷ The draftsmen explained the effect of Rule 23(c)(3) as follows:

"The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice provided by subdivision (c)(2) was directed,

7. Rule 23(c)(3) provides:

"The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. *The judgment has this scope whether it is favorable or unfavorable to the class.*"

Advisory Committee Notes to 1966 Amendments to Rule 23(c)(3), Fed. R. Civ. P. (emphasis supplied). After class certification, class members "are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse." *American Pipe*, 414 U.S. at 549.

The companion subsections to 23(c)(3) as reformed in 1966 provide standards specifying which cases are eligible for class action status, qualifications for class action representatives, and provisions for court supervision of class counsel and trusteeship over the conduct of class actions. See Rules 23(a)-(b). The amended Rule 23 further requires advance judicial determination, as soon as practicable after the commencement of an action brought as a class action, of whether the case is properly triable as a class action. See Rule 23(c)(1). The thoroughly utilitarian purpose and effect of the amended Rule 23 is to balance fairness to the class members and opposing parties while at the same time promoting the social benefits of representative litigation.

A member of a plaintiff class is afforded significant incentives to pursue his claim through the class action device: spreading and sharing the costs of litigation, pooling of resources, economies of scale in methods of practice and proof, the availability of a presumption that could convert an otherwise marginal individual claim into a successful one, the benefit of special court supervision of counsel and of the case, and the natural cumulative effect of multiple plaintiffs' claims in tending to persuade the trier of fact of the merits of any one.

To obtain those substantial advantages, however, Rule 23 anticipates some subordination of the class

member's individual interests to the interests of the class as a whole. He is required to rely on and abide by the class representatives' strategic and tactical decisions, with the risk that the representatives may emphasize or deemphasize a particular argument or may adduce proof with respect to his own individual situation which is less detailed than if that individual had brought an individual suit.⁸ Still, the representative must faithfully represent the individual's interest and the courts will supervise adherence to that obligation. See, e.g., *Mandujano v. Basic Vegetable Co.*, 541 F. 2d 832 (CA9 1976).⁹

The cost-benefit balance is intended to be of roughly equal fairness to defendants. In return for running the risk of an adverse judgment that would give every member of the class a shortcut to relief, and for sustaining costs and risks that tend to exceed by far the costs and risks of defending substantially fewer individual claims, the defendant in a properly certified class action can be assured that the dispute on the merits will be resolved and that liability will be either foreclosed or defined.

The position advocated by petitioners and the EEOC in this case cannot be reconciled with the utilitarian balance of social and private interests struck by the 1966 amendments to Rule 23. In the first place, the pri-

8. Assuming typicality, the requirement that the class member shall accept the consequences of the class representatives' decisions — whether or not he personally agrees with those decisions — is consistent with the principle of majority rule that so pervades our law. It is consistent, for example, with the policies of the Labor Management Relations Act under which an individual employee may have as his exclusive collective bargaining agent a union for which he did not vote, and under which (absent inadequate representation) he typically may not litigate individual grievances against his employer without union approval.

9. Even after an adverse judgment in the class case, a class member may still pursue his individual claim if he can establish that the class representatives' representation of him was not adequate (i.e., that his claims are atypical).

mary impetus for representative litigation procedures was to avoid multiple litigation and promote judicial efficiency. Petitioners' proposed rule, however, would undoubtedly increase the workload of the federal courts without any corresponding benefit to the public interest. If, as petitioners and the EEOC contend, a decision against a plaintiff class leaves individual class members free to litigate claims in categories reached by the class action, many of the thousands of class action cases now pending in the Federal courts¹⁰ will be but preludes to hosts of individual suits — which will by definition involve stale claims. Petitioners' proposed rule would also upset the balance struck by the draftsmen in Rule 23, would disserve the public interest, and would be grossly unfair to defendants.

10. As of June 30, 1982, there were 3,263 class action cases pending in the United States District Court. In the immediately preceding fiscal year, 1,238 new class action cases had been filed. *Annual Report of the Director of the Administrative Office of the United States Courts* 125 (1982).

CONCLUSION

The much-publicized abuses and unfairness inherent in "one-way intervention" were addressed by the 1966 amendments to Rule 23. In this case, however, the EEOC and petitioners are attempting to restore "one-way intervention" packaged as one-way *res judicata*.

The holding and the judgment of the United States Court of Appeals for the Fourth Circuit, which are compelled by the letter and the intent of the amended Rule 23 and the doctrine of *res judicata*, should be affirmed.

Respectfully submitted,

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Dear Jack:

I consent to your filing a brief *amicus curiae* in the case, *Sylvia Cooper v. Federal Reserve Bank of Richmond*, U.S. Supreme Court No. 83-185.

Happy New Year.

Sincerely,

/s/ JACK GREENBERG

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Re: Baxter, et al. vs. Federal Reserve Bank of
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Dear John:

On behalf of the Respondent, we consent to your filing an amicus curiae brief in the above referenced matter.

Very truly yours,

MOORE, VAN ALLEN AND ALLEN

/s/ GEORGE R. HODGES

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GRH/sf

JAN 26 1984

ALEXANDER L. STEVAS,

CLERK

No. 83-185

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

SYLVIA COOPER, ET AL.,
Petitioners,
v.

FEDERAL RESERVE BANK OF RICHMOND,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

**BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF RESPONDENT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-185

SYLVIA COOPER, ET AL.,
v. *Petitioners,*

FEDERAL RESERVE BANK OF RICHMOND,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

**BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF RESPONDENT**

This brief of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of all parties, and in support of the Respondent, Federal Reserve Bank of Richmond. The consents of the parties have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment

of the employer community in the United States, including both individual employers and trade and industry associations. The Council is governed by a board of directors which is composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. The members of the Equal Employment Advisory Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case—i.e., whether members of a properly certified class, having elected upon notice to remain in the class, are barred by *res judicata* from relitigating individual claims of discrimination following an adverse determination on the class claim of discrimination.

Because of its interest in such issues, EEAC has participated in numerous cases in this Court raising substantive and procedural issues related to litigation of equal employment opportunity claims. *See, e.g., Crown, Cork & Seal Co., Inc. v. Parker*, 103 S.Ct. 2392 (1983); *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057 (1982); *General Telephone Co. of the Southwest v. Falcon*, 102 S.Ct. 2364 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438

U.S. 567 (1978); *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

On March 22, 1977, the Equal Employment Opportunity Commission ("EEOC") filed an action against the Federal Reserve Bank of Richmond ("the Bank"), alleging, *inter alia*, that the Bank had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981, by failing to promote blacks because of race (JA. 6a).¹ On September 26, 1977, three former bank employees² and one present employee³ ("the Cooper plaintiffs") filed a complaint in intervention in the EEOC action alleging, *inter alia*, that the bank had discriminated against each on account of race with regard to promotions, wages and job assignments (JA. 12a). The complaint in intervention also alleged a class action pursuant to Rule 23(a) and (b) (2) of the Federal Rules of Civil Procedure (hereinafter "FRCP").

On April 26, 1978, the district court entered a Consent Order reciting several agreements reached by the parties. (JA. 24a). First, the parties agreed upon a designation of the class to include all black persons who worked for the Bank at its Charlotte, North Carolina office at any time since January 3, 1974. The parties further agreed that while the complaint had alleged racial and sex discrimination in numerous

¹ "JA" references are to the Joint Appendix. "A" references are to the Appendix prepared by the petitioners.

² Sylvia Cooper, Constance Russel, Helen Moore.

³ Elmore Hannah, Jr.

types of employment practices, the complaint stated claims "only as to the *promotion* of blacks in general and the denial of promotions and the constructive discharge of one individual, Sylvia Cooper, on account of her race and sex." (JA. 26-27a) (Emphasis added).

The Consent Order also certified the plaintiffs as class representatives under FRCP Rule 23(b)(2) and (3).⁴ In certifying the class the district court found that "class representation by the plaintiff-intervenors is superior to other available methods for the fair and efficient adjudication of the controversy." (JA. 29a).

The Consent Order further required the plaintiffs to publish a notice of the class action, and to mail the notice to each member of the class. The notice recited that the class representatives had alleged discrimination by the Bank against blacks "in promotions, wages, assignments and other terms and conditions of employment." (JA. 34a). The notice also advised class members, *inter alia*:

4. If you fit in the definition of the class in paragraph 3 you are a class member. As a class member, you are entitled to pursue in this action any claim of racial discrimination in employment you may have against the defendant. You need do nothing further at this time to remain a member of the class. However, if you so desire, you may exclude yourself from the class by notifying the Clerk, United States District Court, as provided in paragraph 6 below.

5. If you decide to remain in this action, you should be advised that: the court will include

⁴ The complaint in intervention sought certification only of a (b)(2) class action. The significance of the additional certification of the class under Rule 23(b)(3) is discussed *infra*.

you in the class in this action unless you request to be excluded from the class in writing; *the judgment in this case, whether favorable or unfavorable to the plaintiff and the plaintiff-intervenors, will include all members of the class; all class members will be bound by the judgment or other determination of this action; and if you do not request exclusion, you may appear at the hearings and trial of this action through the attorney of your choice.* (J.A. 35a-36a) (Emphasis added).

On October 30, 1980, following the liability stage of the trial,⁵ the district court found that plaintiff-intervenors Cooper and Russell had been denied promotions on racial grounds, but that plaintiff-intervenors Moore and Hannah had proven no discrimination. As to the class, the court stated in a Memorandum of Decision:

The court finds that defendant engaged in a pattern and practice of discrimination from 1974 through 1978 by failing to afford black employees opportunities for advancement and assignment equal to opportunities afforded white employees in pay grades 4 and 5.⁶ Defendant has not submitted statistical evidence rebutting plaintiff-intervenors' case with respect to discrimination in those grades. Other than in the above particulars, however, there does not appear to be a pattern and practice of discrimina-

⁵ The trial was bifurcated under the procedure sanctioned in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359-62 (1977).

⁶ On appeal, the Fourth Circuit reversed this finding on the merits, and found no class-wide discrimination at any pay grade.

tion pervasive enough for the court to order relief. (A. 193a-194a).

On March 23, 1981, counsel for the class filed a motion on behalf of petitioners Phyllis Baxter and five other class members to intervene in the class action ("petitioners" or "the *Baxter* plaintiffs"). (JA. 46a). The *Baxter* complaint in intervention alleged, *inter alia*:

Intervenors were employed by defendant at its Charlotte Branch and were subjected to discriminatory employment practices by the Bank pursuant to *the same policies and practices as alleged in the original complaint*. (JA. 47a) (Emphasis added).

The complaint in intervention alleged that each intervenor had been denied promotions because of race and color. Four of the plaintiffs alleged that they had sought promotions at pay grades above grade 5. The other two sought positions at grade 5 or below. The complaint alleged no discriminatory employment actions other than promotions, nor any grounds of discrimination other than race and color.

Each of the *Baxter* plaintiffs had received the notice sent to the *Cooper* class, and had elected not to opt out of the class. Indeed, the *Baxter* plaintiffs each testified at the trial of the *EEOC* and *Cooper* action about various individual claims of discrimination. However, as the Fourth Circuit explained,

specific evidence of individual acts of discrimination in promotion was [deemed] relevant [by the district court], but, under the practice in a bifurcated trial, it was not admitted to establish the class members' right to relief, but to provide

support for the *prima facie* class claim of liability.

698 F.2d at 674-75.

On May 29, 1981, the district court issued its findings of fact and conclusions of law. (A. 197a, 256a). The court found that black employees in the Bank's pay grades 4 and 5 had been subjected to racial discrimination in promotions. As to pay grades above grade 5, however, the district court articulated the following, specific conclusion:

27. The Court concludes that there was *no showing* that the bank had discriminated against black employees with respect to *promotions* out of grades 6 and above, and that defendant did not violate Title VII or 42 U.S.C. § 1981 with respect to promotions out of grade 6 and above. (A. 284a-285a) (Emphasis added).

On the basis of these conclusions, the court denied the *Baxter* plaintiffs' motion to intervene in the class action. The court reasoned that the *Baxter* plaintiffs in pay grade 5 or below were members of the certified class as to which discrimination had been found, rendering intervention unnecessary. The court reasoned that as to the *Baxter* plaintiffs in pay grades *above* grade 5, "[t]he court has found *no proof* of any class-wide discrimination above grade 5 and, therefore, [the *Baxter* plaintiffs] are not entitled to participate in any Stage II proceedings in this case." (A. 287a).

In its Order denying intervention, the court additionally stated:

The pendency of this action has apparently tolled the rights of the would be intervenors to file separate individual actions preceded by claims filed with the EEOC as to Title VII

rights, and it has also apparently tolled their rights to file suit under 42 U.S.C. § 1981.

I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week. * * * * (A. 287a-288a).⁷

Having been denied intervention in the class action, the *Baxter* plaintiffs commenced a new action under 42 U.S.C. § 1981,⁸ alleging again in their complaint that they had been denied promotions by the Bank at its Charlotte Branch on account of their race. (JA. 63a). This new complaint omitted the allegation contained in their earlier *Baxter* complaint in intervention, i.e., that they had suffered discrimination as a result of "the same policies and practices" as alleged in the original class complaint. However, the allegations as to the discrimination in promotions suffered by the individual *Baxter* plaintiffs remained unchanged from the allegations in their complaint in intervention. Once again, the only employment action complained of was discrimination in promotions on account of race. (JA. 63a-70a).

On February 26, 1982, the district court denied the Bank's motion to dismiss the *Baxter* complaint, but entered the findings necessary to permit the Bank to take an interlocutory appeal of its decision pursuant to 28 U.S.C. § 1292(a). (A. 290a). This appeal was consolidated with the Bank's appeal from the adverse portion of the district court's decision on the merits in the *Cooper* action.

⁷ The import of this statement is discussed below, p. 27, *infra*.

⁸ The *Baxter* complaint does not allege violations of Title VII.

On appeal, the Fourth Circuit reversed the district court's finding that the Bank had discriminated against blacks in promotions in grades 4 and 5.⁹ The Fourth Circuit also reversed the district court's decision denying the Bank's motion to dismiss the *Baxter* plaintiffs' complaint. The Fourth Circuit applied the rule that absent due process violations, class members are precluded by the doctrine of *res judicata* from seeking relief individually on charges of discrimination which were decided against them in the class action. Finding no due process infirmities in the class certification, notice or adequacy of representation, the Court of Appeals held that:

The class certified and the charges litigated in the class action included the claims and charges asserted by the plaintiffs in these subsequent individual suits. They . . . are, therefore precluded by the determination of the District Court in the class action that there was no practice of discrimination in promotion out of pay grades above pay grade 5 in the years 1974 forward.

698 F.2d at 674.

This Court granted *certiorari* to consider whether the Fourth Circuit correctly applied the doctrine of *res judicata* to preclude petitioners from maintaining their separate cause of action.

SUMMARY OF ARGUMENT

A. Under the doctrine of *res judicata*, a final judgment on the merits precludes a party from relitigating that which was or could have been litigated in that

⁹ EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983). The plaintiffs did not appeal the district court's finding of no discrimination in all pay grades above pay grade 5. 698 F.2d at 638.

action. In this case, the parties agreed that the only issue which the *Cooper* class would litigate would be whether the Bank had discriminated against blacks with respect to promotions at its Charlotte, North Carolina branch. Following a Stage I trial using the bifurcated trial mechanism, the trial court found discrimination at some pay grades, and none at others. On appeal, the Fourth Circuit reversed the finding of discrimination, so that ultimately no pattern and practice of discrimination at any grade was found.

Petitioners would now maintain an action alleging the exact form of discrimination found absent in the class action, i.e., discrimination in promotions. Absent due process concerns, these claims are barred by the doctrine of *res judicata*.

The petitioners' due process rights were protected by the district court's application of Rule 23 of the Federal Rules of Civil Procedure. This is especially so since the district court certified the class with the parties' consent pursuant to Rule 23(b)(3). Under that subdivision, the court was required to give special attention to whether the instant controversy could best be resolved by a class action or individual ones. Thus, application of Rule 23(b)(3) assured that the petitioners' individual rights were given due consideration.

The district court also ordered that each class member be sent notice of the right to remain in the class or opt out. The petitioners each received notice and decided to remain in the class. The notice procedure further protected the due process rights of the petitioners. In sum, there is no bar to the application of the *res judicata* doctrine here.

B. To allow petitioners to maintain an individual action following litigation of the class action would be

to permit precisely the kind of "one-way" intervention which Rule 23 was intended to avoid. Thus, it would be as if the district court had deferred deciding the question of class certification, and determined after the trial that certification should have been denied early in the action. In either event, the resources of all concerned would have been wasted, while the plaintiffs remain unbound by the judgment in the class action.

In accord with the objectives of Rule 23, the district court certified the class early in the action, and narrowed the class issues for litigation, all with the parties' consent. To hold that the class members are not bound by the adverse class judgment would be to undermine the district court's efforts properly to manage the class. Such a result would also undercut the purposes of the notice which the district court ordered be sent to all class members pursuant to Rule 23(c). To reaffirm its prior decisions recognizing the importance of notice in class actions, particularly as to classes certified under Rule 23(b)(3), the Court should not allow petitioners to avoid the consequence of the election they made upon receiving the 23(c) notice. Rather, the petitioners should be bound by their election.

C. The government contends that the rights of individual class members cannot be decided adversely at Stage I of a bifurcated trial. This argument, however, misconceives the purpose of the bifurcated trial mechanism in class action litigation of employment discrimination claims. The purpose of the device is merely to afford an individual plaintiff a means other than an individual lawsuit by which to satisfy his personal burden of establishing a *prima facie* case. A

plaintiff's election to remain part of a class to present evidence of asserted classwide discrimination does not alter the fact that the burden of establishing a *prima facie* case must be satisfied for his individual claim to survive. Therefore, if the class fails to prove a *prima facie* case by failing to establish a pattern and practice of discrimination, the result for each class member is no different than if the individual had failed to prove a *prima facie* case in an individual action, i.e., his complaint is subject to dismissal.

The petitioners are incorrect in asserting that they were prejudiced by the trial court's post-trial comment to the effect that petitioners were yet free to maintain individual actions under Title VII or 42 U.S.C. § 1981. The time to elect whether to remain in the class or maintain an individual suit had passed four years earlier upon each petitioner's receipt of the class action notice. The trial court's comments years later could not resurrect an option for the petitioners which had long since expired by operation of Rule 23(c).

ARGUMENT

I. THE FOURTH CIRCUIT PROPERLY DETERMINED THAT THE PETITIONERS' CLAIMS OF DISCRIMINATION IN PROMOTIONS ARE BARRED BY THE JUDGMENT IN THE COOPER CLASS ACTION.

As a general matter, subsequent efforts by members of a class to litigate claims that were or might have been brought in the original class action are barred by the doctrine of *res judicata*. Cf., *Migra v. Warren City School District Board of Education*, 52 U.S.L.W. 4151 (U.S. January 23, 1984); 7A Wright & Miller, *Federal Practice and Procedure* § 1789 (1972). Before the bar of *res judicata* may be applied to the claim of an absent class member, however, it must be

shown that invocation of the bar is consistent with due process. *E.g., Hansberry v. Lee*, 311 U.S. 32 (1942).

We show below that the claims which petitioners would assert in their individual action are precisely those which were decided against the *Cooper* class on the merits below. We also show that the due process rights of the petitioners were protected by the operation of FRCP Rule 23, governing class actions.

A. The Fourth Circuit Properly Applied the Doctrine of Res Judicata to Bar Relitigation of the Issues Decided Against the Cooper Class.

"For a prior judgment to bar an action on the basis of *res judicata*, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases." *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir. 1979); *Stevenson v. International Paper Co.*, 516 F.2d 103, 108 (5th Cir. 1975). Here, the petitioners assert that their claims of individual discrimination are to be distinguished from the class claims of discrimination, notwithstanding that both allege discrimination by the Bank at its Charlotte branch in promotion of blacks. Thus, the last portion of the test set forth above is in issue.

"Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 n.6 (1982).¹⁰ *Migra v.*

¹⁰ As this Court noted in *Kremer*, "invocation of *res judicata* and collateral estoppel 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudica-

Warren City School District Board of Education, supra. Application of this test is not difficult where, as here, the *Baxter* complaint in intervention alleged that the plaintiffs

were subjected to discriminatory employment practices by the Bank pursuant to *the same policies and practices as alleged in the original [Cooper] complaint.* (JA. 47a).

The remainder of the complaint in intervention in *Cooper*, and the subsequent complaint initiating the separate action now before this Court, allege that these "policies and practices" were racial discrimination in promotions.

The original *Cooper* complaint alleged a broad variety of discriminatory employment actions. However, the *Cooper* class ultimately stipulated that its complaint stated a cause of action only as to promotions, and the district court's consent order so stated. The district court found a pattern and practice of discrimination in promotions in pay grades 4 and 5. The Court of Appeals reversed that finding on its merits, however, and *certiorari* has not been granted to review that reversal. The law of this case, therefore, is that the Bank did not discriminate in promotions in grades 4 and 5.

As to promotions in grades above grade 5, the district court found no discrimination. When it first articulated its finding on this point, the district court spoke imprecisely, stating in a Memorandum of Decision that in those pay grades, "there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief."

tion.'" 456 U.S. at 467 n. 6, quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980). *Accord*, *Kemp v. Birmingham News Co.*, *supra*, 608 F.2d at 1052.

Supra, pp. 5-6. Petitioners argue that this language implies that *some* individual discrimination was perceived by the district court, albeit insufficient to constitute a pattern and practice warranting classwide remedial relief.

The district court's final judgment with respect to promotions in grades above grade 5, however, is unequivocal and precise. Thus, in its finding number 27, the district court found "that there was no showing that the bank had discriminated against black employees with respect to promotions out of grade 5 and above" *Supra*, p. 7.¹¹ The district court repeated this finding in denying the *Baxter* plaintiffs' post-trial motion for intervention, stating that "[t]he court has found no proof of any classwide discrimination above grade 5" *Supra*, p. 7.

In sum, the allegations in the *Baxter* complaint in intervention make clear that petitioners would relitigate the exact claim decided against the *Cooper* class, i.e., the Bank's promotion practices at its Charlotte branch.¹² Accordingly, absent a violation of due process, the petitioners are barred by the doctrine of *res*

¹¹ The brief of Respondent Bank makes clear that while the district court adopted virtually all of the proposed findings of fact and conclusions of law proposed by the *Cooper* plaintiffs, finding number 27 was not proposed. Rather, it was written by the district court, apparently reflecting the court's deliberate judgment on this point.

¹² Because the *Cooper* class was certified under Rule 23 (b) (2) and (3), the class had the opportunity to seek injunctive, declaratory and monetary relief. Thus, no new action is needed to allow plaintiffs to seek relief which they could not have sought earlier. See *Johnson v. General Motors Corp.*, 598 F.2d 432, 437-38 (5th Cir. 1979).

judicata from maintaining individual actions to relitigate those claims. *Hansberry v. Lee*, *supra*.

B. The Petitioners' Due Process Rights Were Protected by the District Court's Application of the Criteria of Rule 23.

The petitioners contend that they were deprived of their right to maintain an individual action by the manner in which the district court managed the class action. We submit, however, that the district court's application of Rule 23, particularly subdivision (b) (3), protected the due process rights of the petitioners.

As noted above, while the *Cooper* class sought certification only under FRCP 23(b)(2), the district court also certified the class under 23(b)(3) with the parties' consent. This fact alone rebuts petitioners' claim that their right to bring individual actions was abridged.

As described in the Advisory Committee notes to the 1966 amendments to Rule 23, the purpose of the Rule is to distinguish between those controversies best resolved by individual lawsuits, and those "in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness to bringing about other undesirable results." Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102-03. To this end, a district court certifying a (b)(3) class is required to find that the class action procedure is "superior" to other means of resolving the controversy in the circumstances. The Advisory Committee notes state that the following considerations are germane to this determination:

The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the actions through representatives would be quite unobjectionable * * * * The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered.

39 F.R.D. at 104. The Advisory Committee contemplated that evaluation of these issues would be made exactly as it was in this case, i.e., "with the aid of the parties." 39 F.R.D. at 103. Thus, in determining with the parties' consent that the controversy would best be decided by a class action, the district court necessarily considered "the interests of individual members in controlling their own litigations and carrying them on as they see fit." *Id.* at 104. *Accord, Taylor v. Union Carbide Corp.*, 93 F.R.D. 1, 9 (S.D. W.Va. 1980). Thus, the application of Rule 23(b) (3) by the court protected the class members' individual rights, for it required the court carefully to evaluate whether this controversy could best be resolved by a class action as opposed to individual lawsuits.

C. The Notice Sent to the Cooper Class, Affording Petitioners the Chance to Opt Out, Further Protected Petitioners' Rights.

Rule 23(c) (2) was intended to protect the right of individual (b) (3) class members to choose whether to remain in a class, or to opt out. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 154, 173 (1974). This Court

has described the operation and purpose of the notice provisions of Rule 23(c) as follows:

Once it is determined that the action may be maintained as a class action under subdivision (b) (3), the court is mandated to direct to members of the class 'the best notice practicable under the circumstances' advising them that they may be excluded from the class if they so request, that they will be bound by the judgment, whether favorable or not if they do not request exclusion, and that a member who does not request exclusion may enter an appearance in the case. Rule 23(c) (2). Finally, the present Rule provides that in Rule 23(b) (3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion. Rule 23(c) (3). Thus, *potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation 'as soon as practicable after the commencement' of the action* when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. Thereafter they are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.

American Pipe and Construction Co. v. Utah, 414 U.S. 538, 548-49 (1974) (footnotes omitted) (emphasis added) (hereinafter cited as "*American Pipe*").

In the instant case, the petitioners each received the notice described in the Statement of the Case, advising that they could remain members of the class,

or opt out. Petitioners also were advised by the notice that if they remained in the class, they would be bound by the eventual class judgment. Petitioners elected to remain in the class, and participated in the trial. Plainly, the notice procedure protected each petitioner's right to pursue an individual action rather than class relief.

In sum, it is clear that petitioners' due process rights were protected by the district court's application of Rule 23. It was proper, therefore, for the Fourth Circuit to bar petitioners on the grounds of *res judicata*, from maintaining a separate action.

II. TO PERMIT PETITIONERS TO MAINTAIN A SEPARATE ACTION WOULD FRUSTRATE THE PURPOSES OF RULE 23.

A. The Result Petitioners Seek Would Result in a "One-way" Class Action.

An important purpose of the 1966 amendments to Rule 23 was to end the "spurious" or "one-way" class action, in which class members were permitted to intervene after a judgment on the merits favorable to their interests, while remaining unaffected by a judgment contrary to their position. As the Advisory Committee on the amendments noted:

Under proposed subdivision (c) (3), one-way intervention is excluded, the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

39 F.R.D. at 106.

To this end, Rule 23 is designed to encourage the district court to determine whether to certify a class

"as soon as practicable after the commencement of the action" *American Pipe, supra*, 414 U.S. at 548-49. In some cases, as, for example, where it is difficult to tell whether the claims of the asserted class representatives are typical of the claims of the putative class, deferral of a decision on class certification may be appropriate. It has been recognized, however, that even when deferral is proper, unfairness sometimes results. First, "[a] negative determination following trial reveals in retrospect an apparent waste of judicial and party resources, but the waste is real only if it be assumed that an earlier determination was possible." *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 275 n.11 (4th Cir. 1980). Second, though a deferred decision not to certify the class finally favors the party opposing class certification, deferring it has been unfair to the extent it allows, in effect, one-way intervention by class members. *Id.*

Where it is unclear whether a class should be certified early in an action, lower courts have struggled to avoid such unfair results. See, e.g., *Stastny v. Southern Bell Telephone & Telegraph Co.*, *supra*, *Huff v. N.D. Cass Co. of Alabama*, 485 F.2d 710 (5th Cir. 1973). In the instant case, however, the district court was able to determine early in the action with the parties' consent that certification of a class on a single, narrow issue was appropriate. In this circumstance, a holding which would amount to deferred denial of certification would result in a "real" waste of resources. *Stastny v. Southern Bell Telephone & Telegraph Co.*, *supra*.

This is precisely what would result, however, if petitioners are permitted to bring an individual action. The effect would be no different than if certifi-

cation of the class had been deferred, and ultimately denied, following the trial on the merits. Thus, the Bank and the courts below would have invested their resources in lengthy class action litigation, while the class members remain unbound by the judgment. See *Crown, Cork & Seal Co., Inc. v. Parker*, 103 S.Ct. 2392, 2395-96 (1983). The district court's efforts to achieve early certification in accord with Rule 23 would be undermined. In sum, the petitioners would have had the benefit of a one-way class action, which is exactly what Rule 23 is intended to avoid. Moreover, "the efficiency and economy of litigation which is a principal purpose of the [Rule 23] procedure" would have been defeated. *American Pipe, supra*, 414 U.S. at 553.

B. To Allow Petitioners to Maintain an Individual Action Would Frustrate the Purpose of the Notice Provisions of Rule 23

In *Eisen v. Carlisle & Jacquelin, supra*, this Court went to great lengths to assure that members of a (b) (3) class receive proper notice of their right to remain in or opt out of a class. As noted above, the Court deemed this notice essential to protection of the class members' due process rights. See *Crown, Cork & Seal Co., Inc., v. Parker, supra*, 103 S.Ct. at 2396.

At the same time, however, the notice procedure has other important purposes. It serves to identify the class members, and to ascertain which members will be bound by the judgment. *Id.* at 2397. See also *Johnson v. General Motors Corp., supra*, 598 F.2d at 437-38.¹³ It also allows the parties and the court to

¹³ It has also been recognized that the notice provisions of Rule 23(c) help promote settlements of class actions, in that

assess the magnitude of the action, and to calculate and allocate the resources required to deal with the action accordingly. Obviously, the court's management of the class action is improved significantly by having such information as early in the action as possible.

In this case, the sufficiency of the notice sent to the class is unchallenged, and it is undisputed that the petitioners each received the notice and decided not to opt out of the class. As the Court made clear in *American Pipe, supra*, the potential class members "retain the option" to withdraw from or participate in the class action "*only* until . . . they are sent notice" 414 U.S. at 548-49. (Emphasis added). In these circumstances, to allow petitioners to maintain an individual action, and thus avoid the consequences of the election they made upon notice, would be to frustrate the Rule 23 notice mechanism. For these reasons, the Court in this case should reinforce the emphasis it has placed on the importance of notice in Rule 23(b)(3) class actions, and hold that the petitioners are bound by the election they made when they declined the opportunity to opt out of the *Cooper* class. *Eisen v. Carlisle & Jacquelin, supra*; *American Pipe, supra*. See *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 411-12 (2d Cir. 1975).

a defendant who desires to settle a class action can be assured following the notice procedure that any settlement will bind those who have elected to remain in the class. *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); *Kemp v. Birmingham News Co., supra*, 608 F.2d at 1053-54.

III. A JUDGMENT ON THE MERITS ADVERSE TO THE CLASS AT STAGE I OF A BIFURCATED TRIAL PRECLUDES SUBSEQUENT INDIVIDUAL ACTIONS BY CLASS MEMBERS.

The United States and Equal Employment Opportunity Commission (EEOC), as amici, contend that the adverse judgment in the *Cooper* class action could not possibly have determined the petitioners' individual claims, because the trial was limited to the issue of classwide liability pursuant to the bifurcated trial procedure sanctioned by the Court in *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976) (hereinafter cited as "*Franks*"). Brief for United States and EEOC at 14-16. We have already demonstrated that in this particular case, the claims which petitioners would press were presented to and decided by the courts below. We now address the government's broader argument, i.e., that the claims of individual plaintiffs inherently are not finally decided when Stage I of a bicurcated trial yields a judgment on the merits adverse to the class.

Stated simply, the government's contention misperceives the nature of the bifurcated trial mechanism created by the Court. In *Franks*, the class representatives proved that the employer had engaged in a pattern and practice of discrimination in violation of Title VII. Despite this showing, the trial court placed the burden of proving discrimination against individual class members upon the plaintiffs. The Court found error in this allocation of the burden of proof, concluding that by proving a pattern and practice of discrimination against the class, the "plaintiffs had made out a *prima facie* case of discrimination against the individual class members." *International Brotherhood of Teamsters v. United States*, 431 U.S. 357, 359 (1977) (hereinafter cited as

"*Teamsters*") (emphasis added). The court held that the burden had thus been shifted to the employer to prove that the individual members of the class had not been victims of the proven pattern and practice. *Id.*

In explaining its *Franks* ruling, the Court in *Teamsters* made clear the purpose of the bifurcated trial mechanism. As background, the Court recounted that in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), it had "considered 'the order and allocation of burden of proof in a private, non-class action challenging employment discrimination.'" *Teamsters*, *supra*, 431 U.S. at 357. Thus, in *McDonnell Douglas*, the court held that "an individual Title VII plaintiff must carry the initial burden of proof by establishing a *prima facie* case of racial discrimination." *Id.* This initial showing creates the inference that the employment action of which the minority plaintiff complains was due to discrimination prohibited by Title VII, and shifts the burden to the employer to "rebut that inference by offering some legitimate, nondiscriminatory reason" for the employment action. *Id.* at 358.

In *Franks*, it was argued that the *McDonnell Douglas* pattern was the only way to show a *prima facie* case of individual discrimination. The Court made clear, however, that such is not the case. Thus, the Court in *Franks* permitted an individual plaintiff to join with other members of a class to demonstrate a pattern and practice of prohibited discrimination, and held that when a class of plaintiffs makes such a showing, it has "made out a *prima facie* case of discrimination against individual class members." *Id.* at 359. Once this showing is made, the burden shifts to the employer to rebut the resulting infer-

ence of discrimination. If this inference is not rebutted, the Court may find for the plaintiff class in the Stage I liability phase and proceed to Stage II to determine appropriate remedies. In Stage II, the defendant has the opportunity to demonstrate that individual employment decisions were not the result of the proven, discriminatory pattern and practice.

The significant point which this Court emphasized in *Teamsters* is that the bifurcated trial mechanism created in *Franks* is nothing but an alternative to the *McDonnell Douglas* pattern for the individual Title VII plaintiff's proof of a *prima facie* case. As the Court stated in *Teamsters*, "[t]he *Franks* case thus illustrates another means by which a Title VII plaintiff's initial burden of proof can be met." *Id.* at 359. In other words, a Title VII plaintiff may choose between two methods of establishing his *prima facie* case. He may bring an individual action, and attempt to sustain the *McDonnell Douglas* burden by himself. Alternatively, he may become part of a class, and utilize the economies of the class action to satisfy his personal burden of proving a *prima facie* case if the class proves a pattern and practice of discrimination. As this Court stated in *Teamsters*:

The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on discriminatory criterion illegal under the Act.

In *Franks* . . . the Court applied this principle in the context of a class action.

Thus, under *Franks*, a Title VII plaintiff may use the class action device to sustain his own burden of proof. However, that the plaintiff may opt to prove his *prima facie* case by means of the kind of evidence which a class would present, i.e., pattern and practice evidence, does not alter the basic fact that the burden of establishing a *prima facie* case must be satisfied for his individual claim to survive. Stated otherwise, the burden which the class must sustain is nothing more than the aggregate of the burdens of the respective class members. As has been recognized, "Rule 23, as amended, contains nothing to indicate that it has now become something more than a procedural device to permit several plaintiffs to unite in a single suit." *Snyder v. Harris*, 268 F. Supp. 701, 704 (E.D. Mo.), *aff'd*, 390 F.2d 204 (8th Cir. 1968).

Thus, if a class fails to establish a *prima facie* case of discrimination because it can show no pattern and practice of discrimination, the result is no different for the individual class members than if each had brought an individual action, and failed to establish a *prima facie* case under *McDonnell Douglas*.¹⁴ In the instant case, the petitioners decided that the class action presented a desirable alternative to bringing individual actions, and they elected upon notice to re-

¹⁴ "The Court as well as the parties must be mindful that, should [a] proposed class be certified, the individual rights of the class members will be affected whether the named plaintiffs win or lose on the merits." *Taylor v. Union Carbide Corp.*, *supra* 93 F.R.D. at 3. As Judge Gobold of the Fifth Circuit once noted, "counsel, and at times the courts, [move] . . . blithely ahead tacitly assuming all will be well for surely the plaintiff will win and manna will fall on all members of the class. It is not quite that easy." *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1127 (5th Cir. 1969) (Gobold, J., specially concurring).

main in the *Cooper* class. The *Cooper* class failed to establish a pattern and practice of discrimination at any pay grade, i.e., it did not make a *prima facie* showing of discrimination. The plaintiffs individually are bound by this result. Having each failed to make a *prima facie* showing of discrimination because their class established no pattern and practice, the individual petitioners' complaints are subject to dismissal, just as they would be if each plaintiff had failed to prove a *prima facie* case under *McDonnell Douglas*.

The ultimate point is that the government is simply wrong in its contention that individual claims of discrimination cannot be finally adjudicated in Stage I of a bifurcated class action under *Franks*. Where the plaintiff class satisfies its burden of proving a *prima facie* case, then the question whether individuals are entitled to relief is left for Stage II, where the individual plaintiffs enjoy the benefit of the presumption of discrimination flowing from the success of the class in Stage I. Where the class fails to make out a *prima facie* case, however, the individual class members are properly bound by that result, and the judgment against the class precludes their pursuit of further individual actions on the same cause of action.

IV. THE COMMENTS OF THE DISTRICT COURT CONCERNING THE PETITIONERS' INDIVIDUAL ACTIONS DO NOT ALTER THE PRINCIPLES OF *RES JUDICATA* OR RULE 23.

Petitioners make much of the district court's comments at the conclusion of the trial to the effect "that it saw no reason why the plaintiffs could not file their individual suits under § 1981 or why the EEOC could not validate a suit under Title VII by issuing now a right to sue letter." 698 F.2d at 675. As the Fourth

Circuit held, however, those comments could have had no effect on petitioner's substantive rights, for the comments were issued four years after the point when petitioners were required to make their binding election on whether to remain in the class or opt out.

Thus, as noted above, this Court made clear in *American Pipe* that a class member retains the option to opt in or out of a class only until notice is received. Once that point is past, and the class member has decided to remain in the class, the option is extinguished, and the individual is bound by the judgment which the class achieves on the merits in accord with the principles of *res judicata*. Clearly, the subsequent comment of the district court could not serve to resurrect an option which had long since been extinguished by operation of Rule 23.

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the decision of the Fourth Circuit below dismissing the petitioners' action should be affirmed.

Respectfully submitted,

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CLERK

OCTOBER TERM, 1983

SYLVIA COOPER, ET AL., PETITIONERS

v.

FEDERAL RESERVE BANK OF RICHMOND

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a prior finding that an employer has not engaged in a pattern or practice of racial discrimination against the class to which petitioners belong precludes their assertion of individual claims that they were discriminated against because of their race.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-185

SYLVIA COOPER, ET AL., PETITIONERS

v.

FEDERAL RESERVE BANK OF RICHMOND

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AND THE EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE SUPPORTING PETITIONERS**

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, prohibits, inter alia, racial discrimination in employment. The Equal Employment Opportunity Commission and the Attorney General are responsible for the enforcement of Title VII, 42 U.S.C. 2000e-5 and 2000e-6. Title VII is also enforced through private lawsuits, 42 U.S.C. 2000e-5, which provide an important complement to federal enforcement efforts. The federal government therefore has an interest in the development of the proper standards to govern private Title VII actions. In addition, since the government as an employer is subject to private suit under Title VII, 42 U.S.C.

(& Supp. V) 2000e-16, the decision in this case will affect the federal government as a Title VII defendant. The United States has participated in previous private Title VII class action cases for similar reasons. *E.g.*, *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981).

STATEMENT

1. On March 22, 1977, the Equal Employment Opportunity Commission brought a civil action in the United States District Court for the Western District of North Carolina alleging that the Federal Reserve Bank of Richmond (the Bank) had violated Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a).¹ Specifically, the complaint alleged that the Bank had failed to promote black employees at its Charlotte, North Carolina, branch because of their race (II C. A. App. 1-3).² On Sep-

¹ Although Federal Reserve Banks perform important statutory functions, they are not governmental bodies for Title VII purposes, and their employees are not employees of the federal government. Upon the filing of an organization certificate with the Comptroller of the Currency, a federal reserve bank becomes a body corporate, with power to sue and be sued, and to appoint employees, define their duties, and dismiss them "at pleasure" (12 U.S.C. 341). Only the appointment of the president and first vice president requires the approval of the Board of Governors of the Federal Reserve System (*ibid.*). The Board of Directors of the bank, or its duly authorized officers or agents, is empowered to exercise "such incidental powers as shall be necessary to carry on the business of banking" (*ibid.*)—obviously including the establishment and implementation of personnel policies, including the ones challenged in this action.

² "II C. A. App." refers to the Appendix filed in the court of appeals in the Baxter case; "I C.A. App." refers to the Appendix filed in the court of appeals in the EEOC case.

tember 21, 1977, the district court permitted Sylvia Cooper, Constance Russell, Helen Moore and Elmore Hannah, Jr. (the Cooper petitioners) to intervene in the action. A class consisting of "[a]ll black persons who have been employed by the defendant at its Charlotte Branch Office at any time since January 3, 1974 * * *, who have been discriminated against in promotion, wages, job assignments and terms and conditions of employment because of their race" was conditionally certified pursuant to Rule 23(b)(2) and (3), Fed. R. Civ. P., on April 26, 1978 (Pet. App. 199a-200a (footnote omitted)). The district court ruled that the Cooper petitioners were appropriate representatives of the class; it directed the mailing of notice to identifiable class members, and its publication in the Charlotte newspaper (II C.A. App. 11-12). Phyllis Baxter and four other class members (the Baxter petitioners) received this notice (II C.A. App. 86), and did not seek to be excluded from the class, as the notice informed them they could be.³

³ The court order, to which all parties expressly consented, approved a notice that contained the following paragraphs (II C.A. App. 15) :

4. If you fit in the definition of the class in paragraph 3 you are a class member. As a class member, you are entitled to pursue in this action any claim of racial discrimination in employment that you may have against the defendant. You need to do nothing further at this time to remain a member of the class. However, if you so desire, you may exclude yourself from the class by notifying the Clerk, United States District Court, as provided in paragraph 6 below.

5. If you decide to remain in this action, you should be advised that: the court will include you in the class in this action unless you request to be excluded from the class in writing; the judgment in this case, whether

2. An eight-day bench trial was held in September 1980, under the bifurcated procedure sanctioned in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359-362 (1977).⁴ At that time, the Baxter petitioners testified in support of the allegation of a pattern or practice of discrimination.⁵ After considering post-trial submissions by both parties (Pet. App. 191a-192a), the district court issued a Memorandum of Decision holding "that defendant engaged in a pattern and practice of discrimination from 1974 through 1978 by failing to afford black employees opportunities for advancement and assignment equal to opportunities afforded white employees in pay grades 4 and 5. * * * Other than in the above

favorable or unfavorable to the plaintiff and the plaintiff-intervenors, will include all members of the class; all class members will be bound by the judgment or other determination of this action; and if you do not request exclusion, you may appear at the hearings and trial of this action through the attorney of your choice.

6. If you desire to exclude yourself from this action, you will not be bound by any judgment or other determination in this action and you will not be able to depend on this action to toll any statutes of limitations on any individual claims that you may have against the defendant. You may exclude yourself from this action by notifying the Clerk in writing that you do not desire to participate in this action.

⁴ Under that procedure, the stage I trial considers only the question of the employer's liability *vel non*. If liability is found, the claims of individual employees for specific relief are considered in stage II proceedings.

⁵ At the bank's request, their testimony at trial was limited to the class issues (I C.A. App. 524-525). The district court ruled that it would not consider their testimony as presenting individual claims (*ibid.*).

particulars, however, there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief" (Pet. App. 193a-194a). The district court also concluded that respondent Bank had discriminated against Cooper and Russell, but not against Moore and Hannah,⁶ and stated further that "[a]lthough the court also has an opinion about the entitlement to relief of some of the class members who testified at trial, it will defer decision of those matters to a Stage II proceedings" (Pet. App. 194a).

The Baxter petitioners thereupon moved to intervene;⁷ respondent Bank opposed that motion, noting that the Baxter petitioners "can pursue any individual claims they have in separate proceedings" (Response to Motion to Intervene 4 (quoted at Pet. 10)). In denying the motion to intervene, the district court stated that "[t]hose intervenors [sic] * * * in grade 5 or below are in the class as to which relief has been ordered by the judgment in this case and their rights will be dealt with in Stage II proceedings" (Pet. App. 286a-287a).⁸ As to the other applicants

⁶ The district court found that respondent's refusal to promote Cooper to pay grade 8 and her subsequent discharge were discriminatory (Pet. App. 216a-223a) as was its failure to treat Russell similarly to others in pay grade 6 (Pet. App. 223a-229a). Moore complained of her treatment in pay grade 10 (Pet. App. 230a-232a); Hannah was denied promotion from pay grade 3 (Pet. App. 276a).

⁷ One of the Baxter petitioners was denied promotion from pay grade 3, one from pay grade 6, two from pay grade 7, and one from pay grade 9 (II C.A. App. 72).

⁸ In addition to the Baxter petitioners, Emma Ruffin sought to intervene alleging the bank had improperly refused to promote her from pay grade 4 (II C.A. App. 21-24).

for intervention, however, the district court concluded that the finding of no pattern or practice of discrimination in the group to which they belonged disqualified them from participation in the remedial stage of the litigation. The district court accordingly denied the motions to intervene "without prejudice to any underlying rights the intervenors may have" (Pet. App. 289a). It emphasized, however, that, because the Baxter petitioners were class members, the pendency of the suit tolled the applicable statutes of limitations on their individual claims, and "I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week" (Pet. App. 288a).

After denying the motions to intervene, the district court entered detailed findings of fact and conclusions of law. The factual findings included findings based on the testimony of the Baxter petitioners. Thus, the court found that Gilliam, who had sought a preferable job given to a white co-worker, Yates, "had more seniority than Yates and was equally qualified" (Pet. App. 248a); and that a white employee with "a lower performance rating and no greater qualification than Knott" had been promoted to be a supervisor over her, and the Bank had "offered no explanation" for this action (Pet. App. 251a-252a). See also Pet. App. 247a (Baxter findings), 253a (Harrison findings), 253a-254a (McCorkle findings). However, no conclusions of law concerning the individual Baxter petitioners were adopted, although there were such conclusions for all the Cooper plaintiffs, who had, of course, been granted intervention (Pet. App. 263a-283a).

Accepting the district court's suggestion, the Baxter petitioners thereupon filed a new complaint alleging

that each had been denied equal employment opportunities by respondent Bank in violation of 42 U.S.C. 1981 (II C.A. App. 71-73).⁹ The complaint recited the specific facts upon which each individual complainant relied for the claim of disparate treatment (*id.* at 72), and did not allege any general pattern of discriminatory treatment. The complaint sought affirmative relief in obtaining the promotions withheld and back and front pay (*id.* at 73). The Bank moved to dismiss the new action on the ground that it was barred, as *res judicata*, by the prior class action (II C.A. App. 74-80). Although the district court denied the motion, stating its "inten[t] to decide the merits of the claims and appropriate relief, if any, for those claims" (Pet. App. 290a), it certified the question to the court of appeals for immediate review pursuant to 28 U.S.C. 1292 (Pet. App. 291a).¹⁰

3. The court of appeals reversed. It held that a class member who does not opt out of a class action is precluded by *res judicata* from "maintaining subsequently an individual action claiming discrimination in a particular ruled on in the class action" (Pet. App. 178a). The court held that the claims litigated in the class action included those asserted by the Baxter petitioners individually (Pet. App. 179a). Since the court of appeals found no "special circumstances" that would preclude the application of *res judicata*

⁹ The Baxter petitioners, who had not filed charges of discrimination with EEOC, did not seek to sue under Title VII.

¹⁰ The interlocutory appeal of the *Baxter* case was consolidated with respondent Bank's appeal in the class action from the finding of a pattern or practice of racial discrimination in promotions from pay grades 4 and 5, and from the finding of discrimination against Russell and Cooper individually.

(i.e., improper class certification, inadequate notice, or inadequate representation), it held the individual claims barred by the original class action (Pet. App. 177a-184a). Accordingly, it remanded the *Baxter* case to the district court with instructions to dismiss (Pet. App. 184a).¹¹ Rehearing en banc was denied by an equally divided court (Pet. App. 189a).

SUMMARY OF ARGUMENT

Analysis of this case must start with recognition that class claims and individual claims of employment discrimination are distinct, presenting different issues that may be proved by different evidence. Thus, to prevail in a class claim, the employees must show a pattern or practice of discrimination, while individual claims focus on the treatment of the specific employee on a specific occasion. In the original case here, the district court adjudicated the class-wide claim; it did not decide the individual claims of the *Baxter* petitioners.

Although the doctrine of *res judicata* forbids repetitious suits on the same cause of action, it does not preclude litigation between the parties to an earlier suit of related claims that were not, and could not have been, adjudicated in the original suit. The individual employment claims of the *Baxter* petitioners were not adjudicated in the class action, which determined only that there was no pattern of discrimination "pervasive enough" to warrant class-wide relief for the groups to which they belonged. Nor is it rea-

¹¹ The court of appeals also reversed the district court's judgment against respondent in the class action. Although the petition for a writ of certiorari presented two questions concerning that reversal, this Court granted certiorari only on the question involved in the *Barter* appeal.

sonable to conclude that they could have been so litigated—the district court reasonably denied petitioners' motion to intervene; rather than turning the class action into a forum for adjudicating respondent's liability on the particular facts of a large number of discrete claims, the court properly referred the Baxter petitioners to separate suits on their individual claims.

This was an entirely appropriate exercise of the court's discretion in managing a class action. Rule 23 contemplates that the class action will be used to resolve issues common to the class while issues peculiar to each class member may be separately litigated. It is contrary to the purposes of Rule 23 to require each class member to intervene in the class suit in order to avoid forfeiting his right to litigate his individual claim. Nor is it reasonable to require the class member who knows he has been individually discriminated against to opt out of the class action in order to preserve his right to recover for that discrimination in the event the court ultimately determines that the class has not shown that the employer was more generally given to such practices.

An employer who prevails in a class action suit will reap substantial benefits from that victory in defending against any subsequent individual suits. The class member employees in those subsequent suits will be unable to use evidence tending to show any general discriminatory practices, and the employer can rely on the earlier judgment in his defense—for example to aid in rebutting a contention that his asserted business reason for the challenged adverse action was pretextual. Since the class action provides notice of the claims of all the class members, the employer is not prejudiced by lack of notice in the later individual suits.

In any event, on the particular facts of this case, it is clear that respondent urged, and the district court decided, that the Baxter petitioners could present their individual claims in a subsequent suit. After the district court denied petitioners' motion to intervene on that basis, the court of appeals should not have deprived the petitioners of all opportunity to litigate their individual claims.

ARGUMENT

I. RES JUDICATA DOES NOT BAR LITIGATION OF THE BAXTER PETITIONERS' CLAIMS

It is well established that the res judicata effect of a judgment in any action extends to issues that "were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Commissioner v. Sunnen*, 333 U.S. 591, 597-598 (1948); 1B Moore, Lucas & Currier, *Moore's Federal Practice* ¶ 0.410[1], at 1154 (1981). In determining whether the doctrine bars a subsequent suit, courts have considered whether there is such identity of issues that a different judgment in the second action would destroy or impair rights established by the first judgment, and whether the same evidence would suffice to sustain both judgments. Moore, *supra*, at 1158; *Church of the New Song v. Establishment of Religion*, 620 F.2d 648, 652 (7th Cir. 1980); *Herendeen v. Champion International Corp.*, 525 F.2d 130, 133 (2d Cir. 1975); *Stevenson v. International Paper Co.*, 516 F.2d 103, 109 (5th Cir. 1975). It is, we submit, clear that individual claims of racial discrimination of the kind the Baxter petitioners apparently seek to litigate do not involve issues that were or could have been litigated in the EEOC class action.¹²

¹² The *Baxter* complaint by itself might be read as asserting no more than the claims common to the class (II C.A. App.

A. Any individual claims the Baxter petitioners may have were not actually determined in the EEOC class action. The finding that the Bank did not engage in a pattern of discrimination pervasive enough to grant relief did not eliminate the possibility that the Bank may have engaged in some acts of discrimination against individual class members. As the Third Circuit explained in refusing to apply the doctrine of *res judicata* in similar circumstances, a "finding of an absence of class-wide discrimination is not necessarily inconsistent with a claim that discrete, isolated instances of discrimination occurred." *Dickerson v. United States Steel Corp.*, 582 F.2d 827, 830-831 (1978).¹³ See also *Croker v. Boeing Co.*, 662 F.2d 975, 997 (3d Cir. 1981), recognizing that individual claims survive the negative class finding by affirming

72-73), but the district court's factual findings strongly suggest that at least some of the Baxter petitioners do have distinct individual claims (see page 6, *supra*). This is a matter to be considered by the district court in the course of the suit on the individual claims. If no such claims are asserted, that suit should be dismissed.

¹³ Respondents (Br. in Opp. 4) and the court below (Pet. App. 183a) assert that the quoted language is dictum. Although it is true that the court there concluded that the district court had no power to adjudicate the individual claims of non-intervening witnesses after finding an absence of class discrimination, that conclusion rested in substantial part on the different nature of the individual and class claims—the same rationale that led the court to reject the employer's alternative *res judicata* argument. That rationale—and the court's emphasis on the potential unfairness to a defendant employer in permitting intervention after the trial court focused solely on the class issue (582 F.2d at 832)—strongly suggests that the *Dickerson* court assumed the class members could raise their individual claims in subsequent suits.

that class members may move to intervene to obtain an adjudication of their individual claims.¹⁴

Indeed, this Court has repeatedly held that an employer's showing that it has not engaged in discrimination against a group in the aggregate does not immunize it from claims that it has discriminated

¹⁴ Respondent's claim (Br. in Opp. 4) that the decision below "is consistent with other decisions involving this narrow issue," citing *Dalton v. Employment Sec. Comm'n*, 671 F.2d 835 (4th Cir. 1982), cert. denied, No. 82-129 (Oct. 4, 1982); *Woodson v. Fulton*, 614 F.2d 940 (4th Cir. 1980); *Kemp v. Birmingham News Co.*, 608 F.2d 1049 (5th Cir. 1979); *Fowler v. Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979); *Jones v. Bell Helicopter Co.*, 614 F.2d 1389 (5th Cir. 1980); and *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981). *Jones* held that when the EEOC sues on the charge of an individual and that suit is dismissed on the merits, the individual is precluded from bringing a repetitive private action on the identical charge (614 F.2d at 1390). The other cases all involve situations in which a pattern or practice of discrimination is conceded either in a consent decree or in a settlement that includes an award of relief to the class members, including those who subsequently attempt to file individual suits; the latter cases thus simply effectuate the salutary policy against double recovery. There is nothing inconsistent between any of these cases and the *Dickerson* analysis. The individual employment actions of an employer who has engaged in a pattern or practice of discrimination may reasonably be assumed to reflect that general discriminatory practice, so recovery on a pattern or practice claim properly bars a repetitive recovery by class members for individual claims. It does not follow that the absence of a sufficient showing of general discriminatory practice leads reasonably to the assumption that no individual employment decision was discriminatory. See, e.g., *Eastland v. TVA*, 704 F.2d 613 (11th Cir. 1983) (although the district court correctly found evidence of pattern or practice of discrimination insufficient, evidence did establish that one "selecting supervisor" was racially biased, so two named plaintiffs recovered on individual claims).

against particular individuals in the group. For example, in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978), the Court emphasized that "the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." Accordingly, the Court held that "a racially balanced work force cannot immunize an employer from liability for specific acts of discrimination" (*ibid.*). Similarly, in *Connecticut v. Teal*, 457 U.S. 440, 453-454 (1982), the Court reiterated that "[t]he principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as whole." The Court therefore rejected the argument that an employer could justify an employment practice having a disparate effect on black applicants by showing that its employment practices did not in the aggregate have a disparate effect on blacks. These decisions unequivocally show that an employer's nondiscriminatory treatment of a class as a whole does not relieve it of liability for individual instances of discrimination against members of that class. It follows here that the finding of an absence of class-wide discrimination in the EEOC class action did not determine the individual claims of the *Baxter* petitioners.¹⁵

¹⁵ This analysis relates primarily to individual and class claims of disparate treatment, such as the ones involved here (Pet. App. 9a-13a). In disparate impact cases, class and individual claims will generally coincide, because such claims attack a facially neutral policy, applied equally to all employees, on the grounds that the policy has a disproportionate effect on minority employees. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 427 (1971). All class members would generally be affected by the policy in the same way and have the same claim. But cf. *Connecticut v. Teal*, *supra*.

B. Nor is there any basis for concluding that the Baxter petitioners' claims could have been litigated in the *Cooper* class action. The liability phase of a class action is generally restricted to claims of class-wide discrimination; it does not include an opportunity to litigate the discrete claims of nonparticipating class members. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772-773 (1976); *Teamsters v. United States*, 431 U.S. at 360-361; *Dickerson v. United States Steel Corp.*, 582 F.2d at 831-832.

This limitation reflects the different character and methods of proof of the two types of claims. Individual claims focus on the treatment of a specific individual on a specific occasion. The basic question is whether that individual was denied an employment opportunity for a discriminatory reason. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256-259 (1981). To prevail, an employee must initially demonstrate that he applied and was qualified for an available position. The employer must then explain the reason for its unfavorable action. The ultimate question for the trier of fact is whether the employer or its agent, in taking the particular employment action in question, was actually motivated by discrimination or by legitimate business reasons. *Id.* at 257. In a claim alleging a class-wide "pattern or practice" of discrimination, on the other hand, different standards of liability are applied and different proof is required. It is not sufficient for a plaintiff to demonstrate that an employer has engaged in sporadic acts of discrimination. Rather, plaintiffs must prove that discrimination is the company's "standard operating procedure—the regular rather than the unusual practice." *Teamsters v. United States*, 431 U.S. at 336. Proof of class-wide

discrimination generally depends very heavily on statistical evidence concerning the overall treatment of different groups. Although "anecdotal" evidence concerning the treatment of specific individuals is frequently presented as well, such evidence is offered to demonstrate that the employer has a class-wide practice of disfavoring minorities. Such testimony generally will not be a comprehensive or thorough presentation of the merits of the claims of each affected employee.

The district court's management of the *Cooper* class action reflected this difference in standards. The original EEOC complaint and the complaint in intervention of the *Cooper* petitioners alleged that the employer had engaged in a pattern or practice of discrimination against black employees with respect to assignment, promotion, wages and discipline. Statistical evidence on these practices was presented at trial. Although the *Baxter* class members were permitted to testify at trial, their testimony was accepted only to the extent that it was relevant to proof of the class action (I C.A. App. 524-525). The district court's decision was similarly limited to the merits of the class claim.¹⁶ The court concluded that, except in pay grades 4 and 5, there was not a pattern of discrimination "pervasive" enough to justify class relief (Pet. App. 194a). This conclusion was based on findings that there was "no statistically significant difference" between the treatment of white and black employees except in pay grades 4 and 5 (Pet. App. 237a-238a). Although the court's factual findings strongly suggest that it believed at least some of the

¹⁶ It did decide the merits of the claims of the intervening petitioners (see pages 5-6, *supra*).

individual claims of the Baxter petitioners were meritorious (Pet. App. 248a-254a), it made no legal conclusions as to those claims. Finally, following its decision on class liability, the district court specifically refused to permit the Baxter plaintiffs to intervene for the purpose of litigating their individual claims, citing *Dickerson*.

In light of these rulings, the Baxter petitioners' individual claims could not have been litigated in the EEOC class action. The court of appeals therefore erred in applying the doctrine of *res judicata* to preclude the assertion of those claims in a separate suit.

II. FED. R. CIV. P. 23 DOES NOT BAR LITIGATION OF THE BAXTER PETITIONERS' CLAIMS

A. The court of appeals' decision also conflicts with the policies underlying Fed. R. Civ. P. 23. As this Court has explained, "[a] federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage unnecessary filing of repetitious papers and motions." *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 550 (1974); accord, *Crown, Cork & Seal Co. v. Parker*, No. 82-118 (June 13, 1983), slip. op. 5. Under the decision below, however, a class member who wants to benefit from class representation without losing the right to litigate his individual claim must file a protective motion to intervene in the class suit. The decision would thus promote "precisely the multiplicity of activity which Rule 23 was designed to avoid." *American Pipe*, 414 U.S. at 551. It would also pose a difficult dilemma for district courts attempting to keep class actions within manageable limits without sacrificing the rights of class members.

In any event, here the Baxter petitioners did attempt to file precisely such a motion. The Bank suggests (Br. in Op. 7-8) that their motion was untimely, but this Court has disfavored interpretations of Rule 23 that require class members to seek early intervention in order to protect their rights. *American Pipe; Crown, Cork & Seal; United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 n.15 (1977); accord, *Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1261 (5th Cir. 1977). The Baxter petitioners sought intervention at the most logical point in the proceedings; if the district court had concluded that there was a pattern or practice of discrimination, there would have been no need for them to intervene to obtain an adjudication of their separate claims (cf. note 14, *supra*). Instead, they would simply have participated in the stage II proceedings in order to determine the relief, if any, to which each of them would be entitled (*Teamsters*, 431 U.S. at 361-362). Thus, it would be inefficient and contrary to the purposes of Rule 23 as explicated in *American Pipe* and *Crown, Cork & Seal* to require class members to intervene before the determination of the class claim in order to preserve their right to an adjudication of their individual claims.¹⁷

B. The court below (Pet. App. 173a-174a) and respondent Bank (Br. in Op. 7) also suggest that the

¹⁷ Moreover, as this Court emphasized in *Crown, Cork & Seal*, slip op. 5, "permission to intervene might be refused for reasons wholly unrelated to the merits of the claim", for example if the intervention would so complicate the issues to be resolved in the action as to make it unmanageable. Accordingly, even after a class has been certified, class members do not have a right to intervene to obtain an adjudication of their individual claims. *Dickerson v. United States Steel Corp.*, *supra*; *Crocker v. Boeing Co.*, 662 F.2d at 997.

right of class members to obtain adjudications on their individual claims is fully protected by the "opt-out" provisions of Rule 23(c)(2).¹⁸ They emphasize that the Baxter plaintiffs received notice and an opportunity to opt out of the class. By failing to opt out, the Bank argues, the Baxter plaintiffs agreed to be bound by the judgment in the class action. This argument misses the point. There is no dispute over whether the Baxter plaintiffs are bound by the judgment. But this simply means that they are precluded from litigating issues that were litigated in the class action.¹⁹ Giving class members notice and an oppor-

¹⁸ This suggestion, of course, assumes that the suit is brought under Rule 23(b)(3), which permits a class member to opt out. Many Title VII suits are certified only under Rule 23(b)(2), where no such opportunity is available. Cf. *Gonzales v. Cassidy*, 474 F.2d 67, 74 n.12 (5th Cir. 1973). Class members in such suits could hardly be denied both the opportunity to opt out to preserve their claims and the opportunity to preserve their individual claims once a class suit has been filed. Here, the class was certified under both 23(b)(2) and (3), and the notice included the opt out provisions (II C.A. App. 11, 15).

¹⁹ The court in *Dore v. Kleppe*, 522 F.2d 1369, 1374 (5th Cir. 1975) recognized that in determining whether a subsequent suit by a class member is barred by the prior class action because it raises the same cause of action, it is necessary to consider the special nature of class actions. Thus, it is inappropriate in this context to apply the principles of res judicata expansively to bar all claims that might have been litigated in the original action, thereby threatening the manageability of class actions by requiring class representatives to litigate numerous additional issues in order to preserve them. Accord, 18 Wright & Miller, *Federal Practice and Procedure* § 4455, at 474-475 (1981). Cf. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); *Calagaz v. Calhoon*, 309 F.2d 248 (5th Cir. 1962) (judgment in class action to be given res judicata effect only when class members were adequately represented).

tunity to opt out cannot justify stripping them of their statutory right to litigate claims that are beyond the scope of the class action.²⁰ See, 18 Wright & Miller, *Federal Practice and Procedure* ¶ 4455, at 473-474 (1981).

The decision to opt out of a class action is not an easy one. The class member who receives notice of the filing of a pattern or practice suit can be expected to know the facts concerning his own employment history, upon which his individual claim would be based. He may not, however, have sufficient information to be able to make an informed judgment about whether his experience is typical, and thus whether the class claim is meritorious. If he determines not to participate in the class claim, he not only loses the substantial benefits of pooled resources,²¹ he also loses the opportunity to participate in the stage II remedial proceedings in which he could rely on the *Teamsters* presumption (see 431 U.S. at 361-362).²²

²⁰ Indeed, the notice actually provided here can not reasonably be read to contemplate such a result. The notice specifically informed the class members that if they opted out they would "not be able to depend on this action to toll any statutes of limitations on any individual claims that you may have against the [Bank]" (II C.A. App. 15). This strongly implies that such individual claims survive for class members. A class member could hardly read this and believe that the failure to opt out, while tolling the statute of limitations, would waive the claim itself.

²¹ Evidence of an employer's general discriminatory practices would be useful in establishing a *prima facie* case of individual discrimination or in contending that an asserted business justification was pretextual. An individual plaintiff would be unlikely to have the resources necessary to conduct discovery or to hire the experts necessary to present persuasive evidence of general discriminatory practices.

²² It is not entirely clear to what extent a non-participating class member might be able, under principles of collateral

Rule 23 does not force a potential class member to make an election between litigating a class claim and a distinctly different individual claim. Rather, the right to opt out provided by Rule 23 is the right to opt out and present the same claim as that presented in the class action.²³ Where, as here, the claims are genuinely different, the failure to opt out of the class action does not bar the class member's subsequent assertion of the individual claim.

C. In sum, nothing in Rule 23 or the case law interpreting it indicates that an adjudication of class-wide issues against them should bar the distinctly different individual claims of class members. Although Rule 23(c)(3) states that judgments in class actions are binding on all class members, this can only logically refer to the common class question actually adjudicated in the action. This is precisely how Rule 23 has been interpreted. It has been recognized in various contexts that where a class action determines only the class-wide issue of whether the defendant maintained certain illegal policies or practices, that action, resulting in equitable relief, does not bar future suits seeking damages for specific deprivations of individual rights. *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978), cert. denied, 444 U.S. 883 (1979); *Jones-Bey v. Caso*, 535 F.2d 1360 (2d

estoppel, to rely on a finding in a prior class action that the employer had engaged in a pattern or practice of discrimination. Presumably, he would continue to bear the burden of persuasion in his individual suit.

²³ *Herbert v. Monsanto Co.*, 576 F.2d 77, 80, vacated on other grounds, 580 F.2d 178 (5th Cir. 1978); *In re Transocean Tender Offer Securities Litigation*, 427 F. Supp. 1211, 1217-1218 (N.D. Ill. 1977); 18 Wright & Miller, *Federal Practice and Procedure* § 4455, at 473 (1981).

Cir. 1976); *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979). Similarly, a district court's finding of no pattern or practice of discrimination should not bar plaintiffs' claims that they have been subjected to individual acts of discrimination.

III. PERMITTING THE BAXTER PETITIONERS TO PROCEED WITH THEIR INDIVIDUAL CLAIMS IS NOT UNFAIR TO THE BANK.

A. The Bank contends that permitting the Baxter petitioners' claims to go forward will deprive it of the benefit of its judgment and undermine the policies of Rule 23 (Br. in Op. 9-10). This contention is unpersuasive. Class actions will continue to be an efficient way of adjudicating numerous claims against an employer.²⁴ Where class-wide discrimination is found, the court will proceed to adjudicate the claims of entitlement to relief of the individual class members and a single suit will dispose of all claims against the employer. Where, as here, no class-wide discrimination is found, the class action will still have served as a final adjudication of the issue of whether the employer engaged in a pattern or practice of discrimination. The class members are bound by the class action (see, e.g., *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)), and thus will be barred by collateral

²⁴ Of course, resolution of the issues common to the class will not always fully determine the claims of all class members; additional proceedings on the individual issues may be necessary. See, e.g., *Teamsters; Esplin v. Hirschi*, 402 F.2d 94, 100-101 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969). That does not mean that the class action has not served its intended purpose of "achiev[ing] economies of time, effort, and expense, and promot[ing] uniformity of decision as to persons similarly situated" (Fed. R. Civ. P. 23 advisory committee notes).

estoppel from contesting that finding in any future suit (*Dore v. Kleppe*, 522 F.2d 1369, 1374 (5th Cir. 1975)).²⁵ They will thus be precluded from using evidence tending to show such a pattern or practice to establish a prima facie case of individual discrimination, or to establish that the defendant's asserted reasons for its personnel decisions were pretextual. In contrast, the Bank can rely on the finding here in defending against the individual suits; the fact that it has *not* engaged in a pattern or practice of discrimination is relevant to, although not dispositive of, the claim that its actions in any particular case were discriminatory. *Furnco Construction Corp. v. Waters*, 438 U.S. at 580.

Class members will be limited to presenting the unique facts of their own individual situation. If such facts do not of themselves reasonably support a charge of discrimination, a pattern or practice decision favorable to the employer could be used to justify the award of counsel fees to it under *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). This should serve to discourage the filing of insubstantial individual claims in the wake of an unsuccessful class suit, and to protect the employer if such claims are filed.

B. The Bank will not be prejudiced in defending the suit by the Baxter petitioners by any lack of adequate notice of their claims. The filing of the class action put the Bank on notice of the claims of all employees denied promotion since 1974. *Crown, Cork*

²⁵ For this reason, respondent's claim (Br. in Op. 8-9) that the Baxter petitioners are asserting a right to the "one-way intervention" eliminated by the 1966 amendments to Rule 23 is without merit. Cf. *American Pipe & Construction Co. v. Utah*, 414 U.S. at 547-548.

and *Seal v. Parker*, slip op. 7-8. If there had been a finding of class-wide discrimination, stage II proceedings would have been conducted to determine the proper relief for individual class members (*Teamsters*, 431 U.S. at 361-362). The Bank would have had to establish the circumstances surrounding any individual class member's lack of promotion in attempting to prove that, even absent the pattern of discrimination, the individual still would not have been promoted (*id.* at 362). Thus, the filing of the class action put the Bank on notice of the need to preserve evidence concerning the employment history of all class members. That plaintiffs' individual claims will now be heard in a separate suit rather than during stage II proceedings certainly causes no prejudice to the Bank.²⁶

IV. DISMISSAL WAS IMPROPER ON THE PARTICULAR FACTS OF THIS CASE

Even if this Court were to disagree with our primary submission and conclude that either the principles of *res judicata* or the interests underlying Rule 23 would ordinarily bar the assertion of individual claims of discriminatory treatment after a finding that no pattern or practice of such discrimination has been established, the court of appeals erred in directing the dismissal of the Baxter petitioners' suit on the particular facts of this case.

The Bank opposed intervention by the Baxter petitioners on the ground that they could file a separate

²⁶ The fact that the district court resolved some issues in the class suit in the Bank's favor can make no difference here, in light of the Baxter petitioners' attempt to intervene and the district court's suggestion that they should instead pursue their individual claims in a separate suit. (See pages 5-6, *supra*).

action (page 5, *supra*) ; the district court agreed, and expressly so stated in its denial of intervention (Pet. App. 288a-289a), which was stated to be "without prejudice to any underlying rights" of petitioners (*id.* at 289a). Moreover, the district court's findings of fact make it clear that it did not intend, by its refusal to find a pattern or practice of racial discrimination except in pay grades 4 and 5, to foreclose the possibility of proving particular instances of discrimination against individual employees in other grades (Pet. App. 248a-254a).²⁷ And in certifying for interlocutory appeal the denial of the Bank's motion to dismiss, the district court again made clear that it had not intended, by its management of the class suit, to foreclose the bringing of individual claims not included within its finding of liability in the class action (Pet. App. 290a).

In these circumstances, the court of appeals clearly erred in dismissing the district court's explanation of the effect of its order denying intervention as "plain dictum" (Pet. App. 182a), and refusing to give effect to the stated limitations of that court's rulings. Instead, the court of appeals should have deferred to the district court's exercise of its discretion in managing the class action.²⁸ In any event, the principles

²⁷ Indeed, the findings that petitioners Cooper and Russell, who had intervened, had been discriminated against in pay grades 7 and 6 are flatly inconsistent with any such conclusion (Pet. App. 216a-229a, 263a-274a). It is not entirely clear whether the courts below passed on the question whether there was a pattern or practice of discrimination in promotions out of pay grade 3, which petitioner Harrison occupied. This is a matter for decision in the *Baxter* action on remand.

²⁸ Fed. R. Civ. P. 23(d) ; *Crocker v. Boeing*, 662 F.2d at 997 ; *In re Caesars Palace Securities Litigation*, 360 F. Supp. 366, 398-399 (S.D.N.Y. 1973).

of res judicata do not bar the maintenance of a second action in which the defendant has acquiesced. Restatement (Second) of Judgments § 26(1)(a) (1982). Nor do they preclude a court from limiting the scope of the action before it by reserving the plaintiff's right to bring a second action (*id.* § 26(1)(b)). Both of these exceptions apply here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1983

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No. 83-185-CFX
Status: GRANTED

Title: Sylvia Cooper, et al., Petitioners
v.
Federal Reserve Bank of Richmond

Docketed:
August 4, 1983

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Schnapper, Eric

Counsel for respondents: Hodges, George R., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 20 1983		Application for extension of time to file petition and order granting same until August 4, 1983 (Chief Justice, June 22, 1983).
2	Aug 4 1983	G	Petition for writ of certiorari filed.
3	Aug 4 1983		Appendix of petitioner filed.
5	Aug 10 1983		Order extending time to file response to petition until October 3, 1983.
6	Sep 7 1983		Order further extending time to file response to petition until October 8, 1983.
7	Oct 3 1983		Brief of respondent Fed. Reserve Bank of Richmond in opposition filed.
8	Oct 7 1983		Brief of respondent United States in opposition filed.
9	Oct 12 1983		DISTIBUTED. October 28, 1983
10	Oct 25 1983	X	Reply brief of petitioners Sylvia Cooper, et al. filed.
11	Oct 31 1983		The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. ***** Record filed.
12	Nov 26 1983		Record filed.
13	Nov 26 1983		Certified original record & proceedings received. (3 Boxes)
14	Dec 15 1983		Brief amicus curiae of EEOC filed.
15	Dec 19 1983		Joint appendix filed.
17	Dec 16 1983		Brief of petitioners Sylvia Cooper, et al. filed.
19	Dec 23 1983		Order extending time to file brief of respondent on the merits until January 26, 1984.
20	Dec 29 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Jan 16 1984		Motion of the Solicitor General for leave to participate in oral GRANTED.
22	Jan 26 1984		Brief of respondent Fed. Reserve Bank of Richmond filed.
23	Jan 26 1984		Brief amicus curiae of Equal Employment Advisory Council filed.
24	Jan 26 1984		Brief amicus curiae of Boeing Company filed.
25	Feb 14 1984		SET FOR ARGUMENT. Monday, March 19, 1984. (4th case)
26	Feb 15 1984		CIRCULATED.
27	Mar 8 1984	X	Reply brief of petitioner Sylvia Cooper, et al. filed.
28	Mar 19 1984		ARGUED.